No. 87-626-CFX
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Title: Michael N. Sheridan, et ux., Petitioners
v.
United States

Docketed:
October 16, 1987

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Kator,Michael J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 16 1987	G	Petition for writ of certiorari filed.
3	Nov 16 1987		Order extending time to file response to petition until December 18, 1987.
4	Dec 18 1987		Brief of respondent United States filed.
5	Dec 29 1987		DISTRIBUTED. January 15, 1988
6	Jan 14 1988	X	Supplemental brief of petitioners Michael N. Sheridan, et ux. filed.
7	Jan 19 1988		Petition GRANTED.
			**********
8	Feb 27 1988		Record filed.
		*	Certified copy of C. A. proceedings and original record received.
12	Mar 1 1988		Brief amici curiae of John Doe One, et al. filed.
11	Mar 3 1988		Brief amici curiae of Bennett Plaintiffs filed.
9	Mar 4 1988		Joint appendix filed.
10	Mar 4 1988		Brief of petitioners Michael N. Sheridan, et ux. filed.
13	Mar 11 1988		SET FOR ARGUMENT, Tuesday, April 26, 1988. (3rd case).
14	Mar 31 1988		CIRCULATED.
15	Apr 4 1988	X	Brief of respondent United States filed.
16	Apr 19 1988	X	Reply brief of petitioners Michael N. Sheridan, et ux. filed.
18	Apr 26 1988		ARGUED.

87-626

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IRVING KATOR
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, CHTD.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners

* *Counsel of Record*

October 16, 1987

WILSON - EPES PRINTING CO., INC. - 789-0095 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the intentional tort exception of the Federal Tort Claims Act bars all suits against the United States alleging negligent failure to prevent a federal employee from committing an intentional tort, including cases in which the injury results from the government's breach of an affirmative duty to protect the public and those where the source of the government's duty to prevent the injury arises independent of its status as the assailant's employer.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Michael N. Sheridan and Mary A. Sheridan hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A *infra*, 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (App. B *infra*, 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. *See* App. A *infra* at 1a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 1346(b) provides, in pertinent part:

> Subject to the provisions of [28 U.S.C. §§ 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

STATEMENT

This case arises out of Dr. and Mrs. Sheridan's attempt to recover for the injuries they sustained when, because of the government's negligence, they were fired upon by a Navy enlisted man outside the Naval Medical Center in Bethesda, Maryland. The undisputed facts[1] are as follows:

In February, 1982, Robert W. Carr was a Medical Aide enlisted in the United States Navy and stationed at the Navy Medical Center in Bethesda, Maryland (commonly known as "Bethesda Naval.") He resided in base quarters where he shared a room with another enlisted man. In defiance of Navy regulations which prohibited the possession and storage of firearms in base housing, Mr. Carr maintained a .22 caliber rifle and ammunition in his quarters. Navy regulations not only proscribed such conduct, but as well placed an affirmative obligation on any individual who knew of a violation of such regulations to bring this matter to the attention of the appropriate authorities. Mr. Carr's roommate, also a Navy enlisted man, was aware of Mr. Carr's possession of this contraband, but he remained silent about the weapon and ammunition until the Navy made its investigation into the shooting.

After his assigned shift on February 6, 1982, Mr. Carr began drinking and ultimately became quite inebriated. At some point in the evening, Mr. Carr packed some of his possessions, including the rifle and ammunition, into a bag and left his quarters. Later that evening, three

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[1] This petition arises on appeal of the granting of the government's motion to dismiss; therefore all facts as pleaded by the Sheridans must be accepted as true. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). In any event, all the facts relied upon by the Sheridans were garnered either through discovery or upon examination of the record of the court martial of the enlisted man who shot at them. Accordingly, it is doubtful that the government could contest any of the Sheridans' allegations.

Navy personnel found Mr. Carr lying face down on the concrete floor in a part of the campus known as the "old hospital building." Recognizing that Mr. Carr was inebriated to the point of unconsciousness, they began to escort him to the base emergency room.

Two of the corpsmen carried Mr. Carr while the third carried the bag containing the rifle and ammunition. Mr. Carr was unable to support himself and the corpsmen had a difficult time transporting him to the emergency room. Several times along the way Mr. Carr slipped from their grasp and fell to the floor and, at least on one occasion, Mr. Carr fell head first down a flight of concrete stairs.

Notwithstanding his debilitated condition, Mr. Carr broke free from the two corpsmen supporting him and snatched his bag back from the third. When he grabbed his bag, he revealed the barrel of his rifle. Yet when this happened, none of the corpsmen attempted to restrain or subdue Mr. Carr, forcibly or otherwise. Nor did they attempt to alert base security. Rather they simply fled, apparently without another thought, leaving Mr. Carr to his own devices.

Mr. Carr made his way out of the hospital building and eventually ended up near the public road which fronts the campus of Bethesda Naval. At that point, Mr. Carr began shooting at passing vehicles, including a public transit bus and the vehicle driven by the Sheridans. Mrs. Sheridan was struck both by the bullets and shards of the shattered windshield and she sustained injuries to her face and hands. Dr. Sheridan was not physically injured, but he was traumatized by both the shooting itself and by witnessing his wife's injuries.

After exhausting their administrative remedies, the Sheridans brought suit in the United States District Court for the District of Maryland. The Sheridans claimed that the government had negligently supervised

Mr. Carr, in light of his past displays of psychological instability; that the government was negligent *per se*; and that the government breached a duty of care that arose independent of Mr. Carr's employment status. The government moved to dismiss on the basis of the "intentional tort" exception, 28 U.S.C. § 2680(h). The district court, while "sympathetic" to the Sheridans' plight, App. B *infra* at 26a, granted the government's motion. Over Chief Judge Winter's dissent, the Fourth Circuit affirmed. This petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the scope of the Federal Tort Claims Act. More particularly, this case raises questions concerning the amenability of the government to suit in cases where its negligence allows an intentional tort to be committed and in cases where it assumes, and breaches, an independent duty to protect members of the public from harm. The lower courts have reached inconsistent results in deciding these questions, and some courts have dismissed such claims on what they perceive as this Court's guidance in *United States v. Shearer*, 473 U.S. 52 (1985). Review by this Court is warranted to resolve this split in the circuits and to provide guidance to the lower courts in an area which has proved especially susceptible to inconsistent, divergent and often absurd results.

1. Since shortly after the enactment of the Federal Tort Claims Act in 1946 (Act of Aug. 2, 1946, ch. 753, 60 Stat. 842, hereinafter "FTCA" or "the Act"), courts have struggled to delineate the boundaries of the intentional tort exception of the Act. Courts found especially troubling fact patterns involving government negligence which allowed a foreseeable intentional tort to be committed. *See, e.g., Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954); *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965). By 1985, however, the lower courts had

sketched the rough contours of law: an action would lie against the government only when the intentional tortfeasor was not a federal employee, *Naisbitt* v. *United States*, 611 F.2d 1350, 1353 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980), or when, if the assailant were a federal employee, the government had assumed a duty to protect the victim independent of its status as the assailant's employer. *Rogers* v. *United States*, 397 F.2d 12, 14 (4th Cir. 1968); *Loritts* v. *United States*, 489 F.Supp. 1030, 1031 (D. Mass. 1980).[2]

In 1985 this Court considered for the first time a case raising the question of whether the government was amenable to suit under the FTCA for "negligent supervision" of its employees. *See United States* v. *Shearer*, 473 U.S. 52 (1985).[3] Yet the Court did not resolve this question in *Shearer*, as only three justices joined Chief Justice Burger's opinion concluding that the "arising out of assault [or] battery" language of § 2680(h) was sufficiently broad as to preclude all claims in which the assailant was a federal employee.[4] Indeed, by focusing on whether "deliberate attacks" by a federal employee were involved, 473 U.S. at 55, *Shearer* blurred the distinctions drawn in *Rogers* and *Loritts* and other cases which had focused on the source of the government's duty, rather than the employment status of the assailant.

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[2] The assailant in *Rogers* was an occasional federal employee. The decision in *Rogers* did not turn on whether the assailant was an employee of the government at the time of the assault, however, but upon the fact that independent of the nature of its association with the assailant, the government breached a duty it had assumed to care for the victim.

[3] This Court has previously determined that a claim of negligent supervision of non-employees was actionable under the FTCA. *United States* v. *Muniz*, 374 U.S. 150 (1963). This Court addressed the intentional tort exception with respect to claims of misrepresentation in *Neustadt* v. *United States*, 366 U.S. 896 (1961) and again in *Block* v. *Neal*, 460 U.S. 289 (1983).

[4] We use "*Shearer*" generally to refer to Part IIA of Chief Justice Burger's opinion, on which the Court was evenly divided.

Since this Court's decision in *Shearer*, the lower courts have evinced uncertainty and confusion in handling questions of government negligence that allows intentional torts to be committed. Some courts have construed this Court's decision in *Shearer* as "a strong signal" and thus dismissed such claims solely because the assailant was a government employee. *See Garcia* v. *United States*, 776 F.2d 116, 118 (5th Cir. 1985); *Satterfield* v. *United States*, 788 F.2d 395, 399 (6th Cir. 1986). Indeed, in *Garcia*, the Fifth Circuit overruled precedent which had allowed such claims to be heard in limited circumstances. *See Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1968).

Other courts as well have followed Chief Justice Burger's rationale in *Shearer* to preclude suits alleging negligent supervision. A sharply divided panel of the Second Circuit, in *Johnson* v. *United States*, 788 F.2d 845 (2d Cir.), *cert. denied*, 107 S.Ct. 315 (1986), held that the intentional tort exception precluded a suit on behalf of a minor child molested by a mail carrier which alleged that the Postal Service was negligent in assigning a known child molester to her route. In *Miele* v. *United States*, 800 F.2d 50, 52 (2d Cir. 1986), the Second Circuit went further, reading *Shearer* to preclude a claim based upon a "deliberate" attack by a government employee irrespective of whether this attack would have constituted an intentional tort under state law. The Tenth Circuit, in an opinion in which Chief Judge Holloway reluctantly concurred on the basis of binding circuit precedent, has held that the intentional tort exception shields the government where its negligent failure to provide psychiatric treatment to a federal employee allowed that employee to commit a violent assault. *Hoot* v. *United States*, 790 F.2d 836 (10th Cir. 1986). The split opinion of the court below was based in part on *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986), itself a split decision on the intentional tort ex-

ception analysis. The court below held that under no circumstances will a negligence claim lie against the government if the asserted negligence is permitting a federal employee to commit an intentional tort.

In contrast, three panels of the Ninth Circuit have rejected the reasoning in *Shearer* altogether and have allowed the government to be held liable for negligently failing to prevent an intentional tort from being committed. *See Bennett* v. *United States*, 803 F.2d 1502 (9th Cir. 1986); *Kearney* v. *United States*, 815 F.2d 535 (9th Cir. 1986); *Morrill* v. *United States*, 821 F.2d 1426 (9th Cir. 1987).[5] The Third Circuit in *Shearer* refused to reconsider *in banc* the panel's holding that the intentional tort exception did not bar a claim that the government negligently failed to supervise a serviceman of known violent propensities, 729 F.2d 266 (3d Cir. 1984), and there is no suggestion that the court would disavow that holding now.

The question of whether the government may be held to answer for its negligence in failing to supervise its employees who then commit intentional torts has arisen repeatedly and will continue to arise in courts throughout the country. As Congress did not address this question specifically, either in the statutory language or in the legislative history, courts have arrived at inconsistent results based on irreconcilable analyses. The analysis in *Shearer* has not only split this Court, but as well has sharply divided three of the five circuits which have followed it. Review by this Court is warranted to settle this recurring issue that has split the circuits and many of the panels considering it.

2. The lower courts have reached divergent conclusions not only with respect to "negligent supervision"

[5] The government has filed petitions for rehearing *en banc* in each of these cases. To date, the Ninth Circuit has not acted on any of the petitions.

claims, but also on the narrower question of whether the government can be held accountable for failing to prevent an intentional tort where it has undertaken a special responsibility, apart from its status as employer, to protect the public.

The court below held that the duties the government had assumed by adopting regulations prohibiting possession of firearms on base, and requiring known violations of such regulations to be reported, and the fact that the government's duty to prevent the assault arose wholly apart from the assailant's status as a federal employee, were inapposite. *See also Thigpen*, 800 F.2d at 394 (government's affirmative duty to care for children in a hospital did not bring suit outside the scope of § 2680 (h)). No other court has gone this far and, indeed, every court that has considered these questions has resolved them by refusing to apply the intentional tort exception.

In *Kearney*, 815 F.2d at 537, the Ninth Circuit held that the intentional tort exception did not preclude an action alleging that through negligence, including the violation of applicable regulations, an imprisoned federal employee awaiting trial was allowed to escape and sexually assault and murder a woman. Recognizing that the government's liability would have been unquestioned had the assailant not been a federal employee, *Panella*, 216 F.2d 622; *United States* v. *Muniz*, 374 U.S. 150 (1963), the court could find no principled basis for shielding the government solely because the assailant happened to be a federal employee. The court below, even though it acknowledged that the government would be liable had the person who fired upon the Sheridans been other than a federal employee, App. A *infra* at 4a, nonetheless held that the employment status of the assailant relieved the government of liability.

The Second Circuit has adopted *Shearer's* expansive construction of the intentional tort exception. Significantly, however, in *Johnson*, 788 F.2d 853 n.8, it cited

with approval two district court cases which accord with *Kearney* and which would allow recovery under the facts present here. The court endorsed *Loritts* v. *United States*, 489 F.Supp. 1030, a case in which the government was held to answer for allowing a West Point cadet to assault a visiting woman after the government voluntarily assumed the responsibility for providing escorts for visitors such as herself. Similarly, *Johnson* accepted *DeLong* v. *United States*, 600 F.Supp. 331 (N. Alaska 1984), a case in which the government was held responsible for assaults on civilians by Marine guards who had not been informed that the civilians had authority to be in a restricted area. On October 9, 1987 the Second Circuit heard argument in *Doe* v. *Scott*, 652 F.Supp. 549 (S.D.N.Y. 1987), on the government's interlocutory appeal of a decision holding the intentional tort exception inapplicable to the government's breach of its voluntarily assumed duty to care for children.

Kearney, *Loritts* (which is the only expression on this point in the First Circuit), *DeLong* and *Doe* all stand in conflict with the decision of the court below on the narrower question of whether the intentional tort exception exculpates the government when it breaches a voluntarily-assumed duty, and when it would be liable but for the happenstance that the assailant was a federal employee. This Court recognized in *Block* v. *Neal*, 460 U.S. 289, 297 (1983), that where the government voluntarily undertakes a duty, it is obligated to carry out that duty with due care. The Solicitor General has twice suggested to this Court that the source of the government's duty to supervise the assailant, rather than the assailant's employment status, controls the applicability of § 2680(h). *See Brief for the United States*, at 22 n.5, *United States* v. *Shearer*; *Memorandum of the United States in Opposition* at 4 n.7, *Johnson* v. *United States*. Review by this Court is warranted to harmonize these discordant holdings.

3. This case is an especially appropriate one for plenary review by this Court in that it presents facts which bring into sharp focus the deficiencies of the analysis employed by the courts construing the intentional tort exception broadly to preclude all claims involving assaults committed by federal employees. Particularly with respect to the narrower claim that the government may be held liable where it has an independent duty to prevent the assault, this case presents facts which show that bright lines can be drawn to effectuate Congress' intent to hold the United States liable for its negligence on the same terms as private individuals, while simultaneously protecting the government from artfully pleaded complaints disguising *respondeat superior* claims as claims for government negligence.

There are two factual bases upon which the government's negligence is predicated here which were absent in *Shearer* and *Johnson*. First, the government violated regulations it had implemented to protect individuals such as the Sheridans and thus, under Maryland law, it was negligent *per se*. *See J. Aron & Co., Inc.* v. *Service Transportation Co.*, 486 F.Supp. 1070, 1075-76 (D. Md. 1980). Navy regulations prohibited the storage of weapons on base and required personnel aware of any violation of this regulation to report it to the appropriate authorities. Mr. Carr's storage of the weapon, his roommate's failure to report it and the three corpsmen's failure to alert base authorities that Mr. Carr was roaming the campus with a rifle all violated the Navy's regulations and thus all constituted negligent acts *per se*. Moreover, the injuries sustained by the Sheridans were precisely the injuries the Navy's regulations were designed to prevent.

Where, as here, the government has voluntarily assumed a duty to protect the public by issuing regulations intended to prevent the foreseeable commission of intentional torts, it is responsible for carrying out that duty

with due care. *Block* v. *Neal*, 460 U.S. at 297; *Rogers* v. *United States*, 397 F.2d at 14. If a claim will lie against the government when the breach of an affirmative duty allows a government employee to commit an intentional tort, as the Ninth, and apparently First and Second Circuits hold, then such a claim must lie when the government has spelled out its affirmative obligations in its own regulations. While it may be in some case that a plaintiff will attempt to "semantically recast" a *respondeat superior* claim into a claim of government negligence by asserting some amorphous affirmative duty of the government, this concern is unwarranted where the government's affirmative duty is made explicit by its own regulations. As Chief Judge Winter recognized, focus on the existence of *per se* negligence "provides a bright-line test for the existence of what might otherwise be a nebulous 'affirmative duty' [and] also satisfies concerns about circumvention of § 2680(h) by ensuring that government liability is based on an independent tort, and not on the employment relationship alone." App. A, *infra* at 14a.

The second factual distinction present in this case is that the government conceded that, had the assailant been a private citizen, the intentional tort exception would not apply. Plainly, if the government would be liable had the assailant been a private citizen, the government's liability cannot arise solely because it is the assailant's employer. *Shearer*, 473 U.S. at 57. Here again a bright-line test exists to curtail creative pleadings: if the government would be liable under the same circumstances had the assailant not been a federal employee, then the intentional tort exception does not apply. The focus of such a test is, therefore, not the happenstance of the assailant's employment status, but instead the wrongfulness of the government's conduct.

Chief Judge Winter recognized the irony in exculpating the government solely because it allowed one of its employees to commit an intentional tort: "in an effort to

avoid subjecting the government to suit *just because* of its role as employer, [the analysis] goes to the opposite extreme and offers immunity from suit for precisely the same fortuitous circumstance." App. A *infra* at 13a (emphasis original). *Cf.*, *Block* v. *Neal*, 466 U.S. at 298 ("Any other interpretation would encourage the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits.") Congress cannot be presumed to have intended this ironic, and indeed absurd, result. Review by this Court is especially appropriate as the particular facts present here demonstrate the inadequacies of determining the applicability of § 2680(h) solely by examining the assailant's employment status.

4. Review is also warranted in this case because the analysis in *Shearer* has proved unworkable and has produced results at odds with Congress' intent. If the United States is to be held to the same standards as a private person, 28 U.S.C. § 2674, then there can be no basis for wholesale exclusion of "negligent supervision" claims.

The conclusion reached in *Shearer* and in the court below that the intentional tort exception in § 2680(h) bars all claims of negligent supervision of a government employee is inconsistent with the language and purposes of that provision. Section 2680(h) bars claims against the government "arising out of assault [or] battery." The type of negligent supervision claim in this case, however, does not fall within this bar, as it does not "arise out of" the intentional tort of assault or battery. The Sheridans have alleged that the government was on notice of the threat Mr. Carr presented to others, from his past displays of psychological instability. The government's failure to prevent the resulting foreseeable harm gives rise to a distinct claim. The fortuity that the resulting injury may also give rise to a claim for assault and battery neither adds to nor detracts from the negligence claim. *See, e.g.*, *Beattie* v. *United States*, 756 F.2d 91, 125 n.17 (D.C. Cir. 1984) (Scalia, J., dissenting)

(noting that an intervening intentional or criminal act does not break the chain of causation if it is within the scope of the risk created by the negligence). Review by this Court is warranted to guide the courts to an analysis of such claims that is consistent with the intent of Congress.

Shearer, and courts that have applied it, correctly note that the "arising out of" language contemplates exclusion of more than claims "*for* assault." *Shearer*, 473 U.S. at 55 (emphasis original). *Shearer*, however, expanded the language to cover all claims that "stem from" an intentional assault or battery, if the assailant is a government employee. *Id.* The effect of this interpretation is to equate the immediate cause of the injury with the legal basis of the claim. Thus, any claim which may involve a battery or assault by a federal employee, however tangentially, would be barred. The plain language "arising out of" suggests, however, that the exception focuses upon the genesis of the injury, not its immediate cause. *Shearer*'s interpretation disregards substantive tort law, within which the FTCA and its exceptions must operate. While it may create a simple rule, it hinges liability upon fortuitous circumstances wholly unrelated to Congress' intent.

The legislative history of § 2680, which *Shearer* cites, is sparse and equivocal, and courts have used the same selected statements to support entirely different conclusions as to the scope of the government's liability. *E.g.*, *Sheridan*, 823 F.2d at 827 n.6 (Winter, C.J., dissenting). In interpreting the Act's language, *Shearer* also misapplied the holding of *Neustadt*, 366 U.S. 696. This Court explained the significance of *Neustadt* in *Block* v. *Neal*, 460 U.S. at 298-99, holding that a negligence claim would not be barred by the "misrepresentation" exception to the FTCA, even though the facts of the case would support a common law misrepresentation claim, and the factual and legal questions of the claims would "partial[ly] overlap." *Id.* at 298. *Shearer* does not address *Block*, and applies *Neustadt* inconsistently with *Block*'s limitation.

This Court has previously recognized the government's liability in negligence for failure to supervise. *Muniz*, 374 U.S. at 150. *See also Panella*, 216 F.2d 622, *cited with approval in Shearer*, 473 U.S. at 56. Both *Muniz* and *Panella* involved non-government employees as assailants, but exclusive focus on the employment status of the assailant to determine whether the injury "aris[es] out of" the assault is illogical and inconsistent with the plain language of the statute. Applying *Shearer*, when the government negligently supervises a prisoner, the government will be liable if the prisoner then intentionally injures someone, but only if the assailant is not on the government's payroll. This precise circumstance arose in *Kearney*, yet had the *Shearer* analysis been applied, the government would have been held immune for its own negligence, on facts substantively identical to those that led to government liability in *Muniz*. Congress cannot be deemed to have intended such untenable results. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

The Ninth Circuit illustrated the illogic of this result in *Bennett* and *Kearney*, and, rejecting *Shearer*, relied upon traditional tort analysis to determine the scope of the intentional tort exception. Thus, "arising out of" encompasses cases which seek to shift liability for an intentional tort, based solely upon the fortuity of an employment relationship between the assailant and the government. *Kearney*, 815 F.2d at 537; *Bennett*, 803 F.2d at 1503. Preclusion of such *respondeat superior* claims extends the "arising out of" language, within a framework of tort analysis, beyond simply cases "for assault." At the same time, it assauges Chief Justice Burger's legitimate concern that the "semantical recasting of events," *Shearer*, 473 U.S. at 55, will skirt the bar of § 2680(h).

Under the Ninth Circuit's approach, liability is also determined by applying traditional tort principles: an intentional act will only create liability if it was foreseeable and within the supervisory control of the government. *Kearney*, 815 F.2d at 537; *Bennett*, 803 F.2d at 1503. This result is consistent with Congress' intent to provide redress for injuries caused by government negligence, *e.g.*, *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953), based upon tort claims determined "in the same manner and to the same extent as [for] a private individual under like circumstances." 28 U.S.C. § 2674. *See Bennett*, 803 F.2d at 1504. *Shearer* and courts that apply it ignore these principles, and make no effort to reconcile the *Shearer* result with the Act's primary requirements. Review by this Court is necessary to ensure that individuals will not suffer from overly restrictive constructions of Congress' waiver of an archaic immunity. *See United States* v. *Aetna Surety Co.*, 338 U.S. 366, 383 (1949).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

IRVING KATOR
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, CHTD.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners

* *Counsel of Record*

October 16, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3961

MICHAEL N. SHERIDAN and MARY A. SHERIDAN,
Appellants,

versus

THE UNITED STATES,
Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Herbert F. Murray, United States District Judge.
(C/A 85-775)

Argued: October 8, 1986 Decided: July 20, 1987

Before: WINTER, Chief Judge, and HALL and SPROUSE, Circuit Judges.

Michael J. Kator (Irving Kator; Kator, Scott & Heller on brief) for appellants; Gary P. Jordon, Assistant U.S. Attorney (Breckenridge L. Willcox, U.S. Attorney on brief) for appellee.

SPROUSE, Circuit Judge:

Michael N. Sheridan and Mary A. Sheridan, his wife, brought this action against the United States alleging

that United States Navy personnel negligently failed to prevent a naval enlisted man from firing a rifle into their automobile, injuring Mrs. Sheridan. The district court dismissed the Sheridans' action, holding that it was barred by provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, as interpreted by this court in *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981), *aff'g Hughes v. Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980). We affirm.

Robert W. Carr was an enlisted medical aide in the United States Navy stationed at the Bethesda Medical Center in Maryland. On the evening of February 6, 1982, Carr became totally inebriated after consuming a large quantity of wine, rum and other alcoholic beverages. He packed some of his possessions, including a .22 calibre rifle and ammunition, into a uniform bag and left the barracks. Some time later, three naval corpsmen found Carr unconscious on the floor of one of the hospital buildings and attempted to take him to the emergency room. As the corpsmen carried him, Carr slipped several times, falling to the floor and on one occasion down a flight of concrete steps. Before they reached the emergency room, Carr regained consciousness, broke away from the corpsmen, grabbed his uniform bag from one of them, and displayed the barrel of his rifle. The corpsmen fled, taking no further action either to subdue Carr or to alert any other authority that Carr was inebriated and armed. Carr left the building and ended up near the public street in front of the hospital. He began shooting at passing vehicles, hitting the Sheridans' automobile and injuring Mrs. Sheridan.

The Sheridans brought this action under the provisions of the Federal Tort Claims Act, which waives sovereign immunity for certain tort claims against the federal government. Section 2680(h), however, establishes an exception to the waiver providing, among other things, that it does not apply to "[a]ny claim arising out of

assault, battery. . . ." 28 U.S.C. § 2680(h). In *Hughes* we affirmed the district court's dismissal of a claim against the government because it fell within this exception. There, a postal employee, while on his route, lured two young girls into his postal truck and committed sexual indecencies. He had previously pled guilty to a similar offense. The parents of the children brought an action against the government under the Federal Tort Claims Act alleging the postal supervisor was negligent in allowing the employee to remain in a position where he came into contact with young children. The district court, reasoning that the cause of action arose from the intentional act of the employee and not from the negligence of the supervisor, held the claim barred by § 2680(h).

In *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986), we again affirmed the district court's dismissal of a claim against the government as barred by § 2680(h). In *Thigpen*, a naval corpsman had committed sexual indecencies with two minor girls while they were hospitalized in a naval hospital. An action was brought on behalf of the children contending that the Navy negligently failed to supervise the offending corpsman. There, too, the district court reasoned that the injury resulted from the intentional tort of the corpsman and not from a lack of supervision by the government.

The Sheridans argue that their case is distinguishable from *Thigpen* and *Hughes*. They contend, first, that the actions of the three naval corpsmen in the present case constituted *per se* negligence because they violated a Navy regulation requiring personnel to report violations of another regulation that prohibits the possession of firearms on base. The Sheridans argue that Congress did not intend to immunize "*per se*" negligence from liability through the intentional tort exception to waiver of immunity, but intended the exception to apply primarily to cases involving government supervision. We find no merit

to the Sheridans' contention that we should establish a principle that would eliminate application of the § 2680 (h) exception when "*per se*" negligence is involved.

The Sheridans also argue that Carr's status as an enlisted naval man and, therefore, a government employee, should be irrelevant to the issue of the government's immunity *vel non* from liability for negligently failing to prevent the injury.[1] They correctly assert that the shooting at the Sheridans' vehicle was not connected with Carr's job responsibility or duties as a government employee. The Sheridans further assert that if Carr had not been a government employee, a claim would undoubtedly lie against the government and § 2680(h) would be inapplicable. *See Rogers v. United States*, 397 F.2d 12 (4th Cir. 1968) (holding § 2680(h) inapplicable where probationer alleged that negligence by United States marshal allowed non-government employee to assault and torture probationer). They contend it is anomalous to deny their claim simply because the corpsmen were negligent in the handling of a government employee rather than a private citizen.[2]

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[1] The dissent asserts that a focus on the employment status of the assailant "opens the door to a range of arguments concerning the 'scope of employment'" while its proposed rule would not. Slip op. 21-22. The proposed rule would not eliminate an inquiry into the "scope of employment," however, it would simply shift it to the employees whose alleged negligence allowed the assault to occur.

[2] The dissent attempts to reconcile this perceived anomaly. It proposes a rule that would allow suits arising out of assaults by government employees so long as the asserted negligence by the government employees is not a failure to supervise the assailant. Such a solution does not reconcile the cases, it simply would create an exception to the princple that § 2680(h) bars suits arising out of assaults by government employees. An "anomoly" would still exist —persons assaulted by a government employee would be treated differently depending on whether they could allege negligence by other government employees that allowed the assault to occur but that did not constitute negligent supervision of the assailant. We prefer to follow established Fourth Circuit precedent and hold the present claim barred by § 2680(h).

As we have stated, § 2680(h) is an exception to the general waiver of sovereign immunity contained in 28 U.S.C. § 1346(b). The § 1346(b) waiver, of course, relates to negligent or wrongful acts or omissions of government employees. In negligent supervision cases a plaintiff's cause of action is directed not at the person who inflicted the injury, but at the government employees who, by failure to supervise, did not prevent the harm. Explicit in *Thigpen*, *Hughes* and similar cases[3] is the principle that § 2680(h) bars actions alleging negligence of the supervising employees when the underlying tort is an assault or battery by a government employee. *Thigpen*, 800 F.2d at 394; *Hughes*, 514 F. Supp. at 670. We see no sufficiently distinguishing difference between the facts of *Thigpen* and *Hughes* and the facts here to justify applying a different rule.

In view of the above, the decision of the district court is affirmed.

AFFIRMED.

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[3] *See Johnson by Johnson v. United States*, 788 F.2d 845, 850 (2d Cir. 1986); *Satterfield v. United States*, 788 F.2d 395, 399 (6th Cir. 1986); *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985); *Wine v. United States*, 705 F.2d 366, 367 (10th Cir. 1983).

WINTER, Chief Judge, dissenting:

The Federal Tort Claims Act (FTCA) established a scheme under which the Federal Government waives sovereign immunity for suits based on its employees' negligence, but not on their intentional misconduct. Cases which involve conduct that is purely one type or the other are thus easy to resolve. Problems arise when *both* negligent and intentional conduct play a role in producing the resulting injury. Where government negligence leads to intentional misconduct—e.g., an assault and battery—by a private party, the courts generally allow suits against the United States, based on its negligence. Note, "Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee," 69 Geo. L.J. 803, 804 (1981). But where the same government negligence results in an assault and battery by a *federal employee*, the majority opinion in this case holds that the United States is immune from suit by virtue of the intentional tort exception to the FTCA, 28 U.S.C. § 2680(h). In other words, the majority holds that the employment status of the assailant determines when the United States will be liable for its negligent misconduct. I do not think that this result is supported by the language or purpose of the FTCA, or by this court's previous opinions regarding § 2680(h). I think that the government should be held subject to suit in all cases where its alleged liability is independent of the assailant's employment status—i.e., where a court can isolate a government duty and source of negligence that is based on something other than the fortuitous circumstance that the government happens to be the assailant's employer.

There are two lines of decision in this Circuit regarding the § 2680(h) assault and battery exception, neither of which directly addresses the circumstances of this case.

Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va. 1980), *aff'd sub nom.* Hughes v. United States, 662 F.2d 219 (4 Cir. 1981), involved a postal worker who sexually assaulted two young children. Plaintiffs based their FTCA suit on the theory that the government was negligent in hiring and retaining this employee. Nevertheless, the district court held that § 2680(h) barred the claim because the assailant was a federal employee, while recognizing that the result would differ had the assailant not been employed by the government. 514 F. Supp. at 669-70. We affirmed. Thigpen v. United States, 800 F.2d 393 (4 Cir. 1986), dealt with plaintiff patients who were sexually abused by a corpsman at the Beaufort Naval Hospital. Although plaintiffs premised their FTCA claims on the government's negligence in hiring and supervising the corpsman, we held these claims barred as arising out of assault or battery. *Id.* at 394. We noted that "a different rule may obtain" where the assailant is not a federal employee. *Id.*, n.3.

A different rule did obtain in Rogers v. United States, 397 F.2d 12 (4 Cir. 1968), where a United States marshal allowed plaintiff-probationer to spend the night with an "unsavory" character—not a federal employee—who proceeded to torture the plaintiff. We reversed a summary judgment in the government's favor, ruling that "[w]hen an agency of the United States voluntarily undertakes a task, it can be held to have accepted the duty of performing that task with due care." 397 F.2d at 14. We thus remanded for a determination of the existence and possible breach of such a voluntary assumed duty. Section 2680(h)'s exception for intentional torts was deemed "inapplicable": "if there is a valid claim here, it is founded on negligence even though assault or false imprisonment may be collaterally involved." *Id.* at 15.

I think it illogical to say that the assault and battery claim was only "collaterally involved" in *Rogers* whereas

it was considered the essence of the claim in *Hughes* and *Thigpen* and thus barred by § 2680(h). It simply makes no sense to assert that a negligence claim "arises out of" an assault and battery claim only when the assailant happens to be on the United States payroll. The derivation of an injury or cause of action should not turn on the employment status of the offender. *See* Bennett v. United States, 803 F.2d 1502, 1504 (9 Cir. 1986); 69 Geo. L.J. at 808-09. Rather, the source of a claim depends on the nature of the wrongful behavior in question.

As the majority opinion concedes (*ante* at 5), *Hughes* and *Thigpen*, as well as the other cases relied upon by the majority (*ante* at n.1), are all cases where the purported government negligence was premised solely on claims of negligent hiring and/or supervision. The same was true in United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039 (1985).[1] Such claims are essentially grounded in the doctrine of respondeat superior. In these cases, the government's liability arises, if at all, *only* because of the employment relationship. If the assailant were not a federal employee, there would be no independent basis for a suit against the government. It is in this situation that an allegation of government negligence can legitimately be seen as an effort to "circumvent" the § 2680(h) bar; it is just this situation—where government liability is possible only because of the fortuity that the assailant happens to receive federal paychecks—that § 2680(h) was designed to preclude. *See Shearer*, 105 S. Ct. at 3042-43; *Hughes*, 514 F. Supp. at 668, 669-70; Panella v. United States, 216 F.2d 622, 624 (2 Cir. 1954).

On the other hand, where government liability is independent of the assailant's employment status, it is pos-

[1] Eight Justices decided the case on *Feres* doctrine grounds. The discussion of § 2680(h) by Chief Justice Burger, joined only by Justices White, Rehnquist and O'Connor, was merely dicta. Justice Powell did not participate.

sible to discern two distinct torts: the intentional tort (assault and battery) and the government negligence that precipitated it. Where no reliance is placed on negligent supervision or respondeat superior principles, the cause of action against the government cannot really be said to "arise out of" the assault and battery; rather it is based on the government's breach of a separate legal duty. Shearer v. United States, 723 F.2d 1102, 1106-08 (3 Cir. 1983), *rev'd on other grounds*, 473 U.S. 52 (1985) ("if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA"); Gibson v. United States, 457 F.2d 1391, 1395-97 (3 Cir. 1972) (§ 2680(h) not applicable where intentional misconduct was the foreseeable consequence of government negligence: "Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence"); Loritts v. United States, 489 F. Supp. 1031-32 (D. Mass. 1980) (citing *Gibson* and *Rogers*); 69 Geo. L.J. at 816. Thus, the assertion in *Hughes*, 514 F. Supp. at 668-70, and *Thigpen*, 800 F.2d at 395, that the negligence claim arose out of the assault, is inapposite where the claim against the government is not premised on a theory of negligent supervision or respondeat superior. "Though it may be true that the assault and battery serves to attach consequences to the government's negligence, under traditional tort analysis the negligence remains the legal cause of the plaintiff's injury if the assault and battery by the employee was a foreseeable consequence of that negligence." 69 Geo. L.J. at 808 n.33. *Accord*, *Thigpen*, 800 F.2d at 399 n.10 (Murnaghan, J., concurring) ("The occurrence of the actual assault and battery thus serves only to establish the extent of the plaintiff's injury, not to establish the hospital's breach of duty").

We have used precisely this type of analysis in FTCA cases where the assailant is not a government employee. Thus, in *Rogers*, we invoked traditional tort principles when examining whether the government owed, and breached, a duty to transport and provide subsistence to the plaintiff with due care. The focus of the opinion was the existence of a government duty—not the presence of a subsequent intentional tort. The employment status of the assailant was irrelevant, not because the assailant was a private party, but because we could isolate a government duty and source of negligence that was independent of the government's status as employer, i.e., liability was not based on a claim of negligent supervision.

The principle that I perceive would allow suits against the government when a plaintiff's negligence claim is not based on a theory of negligent supervision or respondeat superior. Several other circuits support this view. *See, e.g.*, Johnson by Johnson v. United States, 788 F.2d 845, 853 n.8 (2d Cir.), *cert. denied* 107 S. Ct. 315 (1986); *Gibson*, 457 F.2d 1391 (3 Cir. 1972); DeLong v. United States, 600 F. Supp. 331 (D. Alaksa 1984); *Loritts*, 489 F. Supp. 1030 (D. Mass. 1980).[2] It is also the basis for the view advocated by the concurring opinion in *Thigpen*: a negligence claim does not "arise out of" assault and battery when based on "the breach of a clear and recognizable affirmative duty. . . ." 800 F.2d at 398 (Murnaghan, J., concurring). Although much of the analysis in that opinion is persuasive, the *Thigpen* majority aptly criticized the proferred standard as overly "elastic" and potentially limitless.

[2] The Ninth Circuit has gone even farther and permitted suits against the government, premised on negligent supervision, as long as the government had notice of the employee's violent tendencies. *Bennett*, 803 F.2d 1502 (9 Cir. 1986). *Accord Shearer*, 723 F.2d 1102 (3 Cir. 1983).

800 F.2d at 395.[3] Indeed, although the concurrence considered *Thigpen* to involve such a clear affirmative duty, the majority there properly recognized that the cause of action was based solely on a claim of negligent supervision, *id.* at 394-95.

The two factors isolated by plaintiffs to disinguish this case from *Hughes*, *Thigpen*, *Shearer*, etc., provide an excellent means for refining the standard advocated by the concurrence in *Thigpen*. I regret to say that the majority opinion in this case summarily dismisses these factors, without any attempt to address the analysis so carefully laid out by the plaintiffs.

A. Irrelevance of employment status

Where, as here, the circumstances of a case are such that the government's negligence would render the United States liable if the assailant were not a federal employee, the fact that the assailant just happens to be federally employed should not be permitted to immunize the United States from suit. The test to be applied is straightforward: would the government be liable if the assailant was not a government employee? If yes, § 2680(h) is not applicable.

There are several advantages to this approach. It satisfies judicial concerns that plaintiffs will circumvent the § 2680(h) bar by simply framing an assault and battery claim in terms of negligence on the part of the government. *See, e.g., Hughes*, 514 F. Supp. at 668;

[3] The *Thigpen* majority also argued that there was no basis in the Act for distinguishing between situations where the government owes an "affirmative duty" and when it does not—all claims "arising out of assault [or] battery" are barred. 800 F.2d at 395-96. This criticism, however, misses the point: the distinguishing factor advocated by the concurrence was intended as a means for determining when a claim can legitimately be said to "arise out of" an assault or battery. This approach is sound, in principle, but requires further refinement, as set out *infra*.

Thigpen, 800 F.2d at 394-95; *Shearer*, 105 S. Ct. at 3042. The government will be subject to suit only in cases where it would be liable for the assault by a private party; i.e., only where government liability is premised on something *other than* the employment relationship. Thus efforts to disguise a respondent superior claim will be precluded. *See Loritts*, 489 F. Supp. at 1031-32 (where government undertakes task of providing escorts to plaintiff and companions, it must perform task with due care; where attack occurred when plaintiff was walking without an escort, "[t]his is not . . . the situation where a plaintiff by virtue of artful pleading seeks to circumvent section 2680(h)").

In addition, this approach will prevent the elevation of form over substance in FTCA litigation. Plaintiffs A & B may suffer the same injury, as the result of the same government negligence. Yet under the government's approach, because of the fortuity that plaintiff A's assailant happened to be a federal employee, A's suit would be barred while B's would not. This situation is particularly troubling since one purpose of the FTCA was to establish a scheme providing uniformity of treatment, unlike the system of private bills that it was replacing. *See* Jayson, 1 Handling Federal Tort Claims: Administrative and Judicial Remedies, § 66.03 (1986).

In this case, had it been a private citizen who took the weapons wrongfully stored in Mr. Carr's room, or had it been a private citizen who the three corpsmen found wandering drunk and brandishing a rifle, the government's liability would be unquestioned. The majority opinion implicitly concedes as much. There is no persuasive reason for the disparate treatment which the government advocates.[4] As explained in *Loritts*, "[t]he

[4] If anything, it makes more sense to hold the government liable for intentional torts of its employees—rather than private parties—over whom it exercises at least some control. *Gibson*, 457 F.2d at 1394; 69 Geo. L. J. at 814 n.63, 821.

Court does not agree that the government can escape liability under section 2680 because of the fortuitous nature of the circumstances following its negligence." 489 F. Supp. at 1032 n.3. *See also Johnson*, 788 F.2d at 853 n.8 ("[t]he negligence alleged . . . [in *Loritts*] was independent of the government's supervision of its employees and the fact that an employee, rather than a non-employee, committed the assault was 'fortuitous'").

In its brief and at oral argument the government acknowledged the irrationality of its interpretation of § 2680(h)—a critical concession in light of the well-established principle that, "whenever possible," statutes should be construed to avoid creating "untenable distinctions and unreasonable results." American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982). Plaintiffs' alternative avoids this anomaly, and properly focuses on the wrongfulness of the government's conduct. The irony in the government's position is that, in an effort to avoid subjecting the government to suit *just because* of its role as employer, it goes to the opposite extreme and offers immunity from suit for precisely the same fortuitous circumstance.

B. Presence of *per se* negligence which leads to precisely the injury that the violated statute or regulation was designed to prevent

Plaintiffs also seek to distinguish cases invoking the intentional tort exception by arguing that they do not, in contrast to the present suit, involve the violation of government regulations—i.e., negligence *per se*. Plaintiffs' brief correctly points out that "*Hughes* does not answer the question of whether Congress intended the government to be free of liability when the injury which arose out of its *per se* negligence was actuated by the foreseeable commission of an intentional tort." The value of this factor in distinguishing the other cases is supported by *Rogers*' pronouncement that voluntary assump-

tion of a task entails the duty to perform it with due care. 397 F.2d at 14. *Accord Loritts*, 489 F. Supp. at 1031. Surely the passage of regulations concerning weapon storage and safety constitutes such a voluntary assumption of duty.

The presence of a *per se* negligence claim effectively answers the criticisms levied at an approach like that of the *Thigpen* concurrence. It provides a bright-line test for the existence of what might otherwise be a nebulous "affirmative duty." It also satisfies concerns about circumvention of § 2680(h) by ensuring that government liability is based on an independent tort, and not on the employment relationship alone. As with the first factor, this one properly focuses attention on the government's negligent conduct, rather than on the fortuity of the assailant's employment status.

Superficially, some of the language in *Hughes*, *Thigpen* and *Shearer* may appear to preclude the approach just outlined. Yet, on closer inspection, the principles announced in those cases are perfectly compatible with, and arguably better served by, the position advocated by plaintiffs.

There are two basic criticisms of plaintiffs' approach that derive from *Hughes*, *Thigpen* and *Shearer*. First, it is contended that the "sweeping language" of § 2680 (h) "excludes any claim *arising out of* assault or battery." *Shearer*, 105 S. Ct. at 3042 (emphasis in original). However, this literalist interpretation is belied by the concession in *Shearer*, *Thigpen* and *Hughes* that § 2680(h) does not bar the identical claim against the government when the assailant is not an employee. As noted above, it makes no sense to say that negligence claims "arise out of" assault and battery claims only when the assailant happens to be a federal employee, *Bennett*, 803 F.2d at 1504; the derivation of a claim cannot rationally be said to turn on the employment status of the assailant.

Moreover, statutory language "should not be read in isolation from the context of the whole Act," but rather with an eye towards the legislation's "object and policy." Richards v. United States, 369 U.S. 1, 11 (1962). *Accord*, Jayson, § 69. In this case, the legislative goal of providing a uniform system for compensating the victims of government negligence[5] is met only through the approach advocated by plaintiffs. Indeed, both *Hughes* and *Panella* explicitly rejected, as "out of keeping with the rest of the act," a literal interpreation of "arising out of" that would have barred negligence suits where the assailant was not federally employed. *Panella*, 216 F.2d at 624; *Hughes*, 514 F. Supp. at 669 (quoting *Panella*).[6]

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[5] *See* Jayson, §§ 66, 66.03, 69; 69 Geo. L.J. at 812 & n.49.

[6] The Supreme Court, sensitive to Congress' desire to use the FTCA to "mitigate [the] unjust consequences of sovereign immunity," has explicitly rejected, in the FTCA context, the traditional approach of strictly construing statutory waivers of immunity. Jayson, §§ 67, 69 (quoting Feres v. United States, 340 U.S. 135, 139 (1950)). *Accord* 69 Geo. L. J. at 813. *E.g.*, *Kosak*, 465 U.S. at 853 n.9 (rejecting strict construction approach as "unhelpful," and noting that "unduly generous interpretations of the exceptions [to the waiver of sovereign immunity] run the risk of defeating the central purpose of the statute"); Block v. Neal, 460 U.S. 289, 298 (1983) (" 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced' ") (citations omitted). *See* also Kielwien v. United States, 540 F.2d 676, 681 (4 Cir.), *cert. denied*, 429 U.S. 979 (1976) ("The [FTCA] is remedial and should be liberally construed to grant the relief contemplated by Congress"); *Bennett*, 803 F.2d at 1504 ("broad immunity is inconsistent with the primary purpose of the Federal Tort Claims Act, to provide a forum for the resolution of claims against the federal government for injury caused by the government's negligence"). Indeed, the judicial trend in recent years have been toward an expansion of government liability via increasingly liberal interpretations of the FTCA. Note, "From *Feres* to *Stencil*: Should Military Personnel

In addition, while it may make sense to view a claim for negligent supervision as "arising out of" the assault, because the sole basis for this vicarious liability is an employee's assaultive conduct, this cannot be said where the government negligence is a distinct tort, independent of the employment relationship. *See Rogers*, 397 F.2d at 15; *Gibson*, 457 F.2d at 1395; *Loritts*, 489 F. Supp. at 1032. Thus, even under a literal reading of the statute, § 2680(h) would allow a suit where the cause of action is not based on a claim of negligent supervision.[7]

The second criticism of plaintiffs' approach, derived from *Hughes*, *Thigpen* and *Shearer*, concerns the policy goals underlying § 2680(h). Of the three principal objectives motivating creation of the exceptions to the

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Have Access to FTCA Recovery," 7 Mich. L. Rev. 1099, 1101, 1104, 1106 (1979).

Although there are some Fourth Circuit opinions that have adhered to the stricter traditional approach, these cases rely primarily on decisions that either preceded the recent liberalization, or that are outside the unique FTCA context. *See, e.g., Thigpen*, 800 F.2d at 394.

[7] The government also argues, citing *Hughes* and *Shearer*, that a negligence claim should be deemed to "arise out of" an employee's assault when the assault is the "immediate" cause of the injury to plaintiff. However, this standard would mean that a negligence claim based on a non-employee's assault—also the "immediate" cause of injury—would be barred by § 2680(h). Yet the courts have clearly rejected that possibility.

The 'immediacy' of a factor contributing to injury is not the litmus test for causation under basic principles of tort law. Multiple factors, some more immediate than others, can all be legal causes of an injury as long as the intervening events—even where intentional or criminal—are reasonably foreseeable. Rest. (2d) Torts, § 302 A-B (1965); *cited in* Courtney v. Remler, 566 F. Supp. 1225, 1232 (D.S.C. 1983), *aff'd*, 745 F.2d 50 (4 Cir. 1984); 69 Geo. L. J. at 808 & n.34, 825-27. Moreover, this 'immediacy' standard was developed in the context of negligent supervision claims, where it was considered necessary to avoid circumvention of § 2680(h) and the resulting expansion of governmental liability—problems that are solved with the standard advocated by plaintiffs.

FTCA, only the desire to avoid United States "exposure . . . to liability for excessive or fraudulent claims" is implicated by the assault and battery exception of § 2680(h). Kosak v. United States, 465 U.S. 848, 858 (1984). *See* 69 Geo. L.J. at 811 n.46.[8] This objective, however, is easily met by plaintiffs' standard, which ensures the existence of an independent tort as the basis for federal liability. As the Second Circuit recently pointed out, the fear of excessive government liability is relevant in cases where liability is premised solely on the employment relationship; i.e., where, unlike this case, the claim is one for negligent supervision. *See Johnson*, 788 F.2d at 853. Indeed, the thrust of Chief Justice Burger's opinion in *Shearer*, 105 S. Ct. at 3042-43, concerns the problems associated with claims of negligent supervision/respondeat superior—i.e., imposing liability on the government *solely* because of its status as employer. *See Johnson*, 788 F.2d at 850 (describing *Shearer*).[9]

The criteria advocated by plaintiffs cannot legitimately be faulted for failure to provide bright lines for application. Whether there has been a violation of a regulation or statute—negligence *per se*—involves a straightforward inquiry. Whether the government would be liable

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[8] The other two are (1) freeing certain government activities (i.e., those involving the delicate exercise of discretion) from the threat of civil suits, and (2) foreclosing this new federal remedy in cases where adequate relief was already available. *Kosak*, 465 U.S. at 858; 69 Geo. L.J. at 811 n.46.

[9] Even Chief Justice Burger's statement that Congress was concerned with a "certain type of factual situation—deliberate attacks by Government employees," 105 S. Ct. at 3042, must be read in this context. This statement immediately follows the contention that Congress did not distinguish *between* negligent supervision and respondeat superior claims, and it precedes the conclusion that "Congress did not hint that it thought the Government's liability for an assault and battery turned on the adequacy of supervision or warnings." Clearly, the focus is avoidance of vicarious government liability.

had the assailant been a private party also entails a relatively simple assessment. The courts currently have little trouble litigating FTCA cases involving private assailants. All that is required here is a determination of whether there is any legal basis—apart from its status as employer—for finding the government to be negligent.

The government's alternative for determining the applicability of § 2680(h), relying on the employment status of the assailant, would be no easier to apply. To focus on employment status opens the door to a range of arguments concerning the 'scope of employment'—e.g., does a battery committed by an off-duty employee constitute a battery by a government employee for purposes of § 2680(h)?[10] *See* 69 Geo. L. J. at 818-20; Gardner, "The Federal Tort Claims Act," 16 Clearinghouse Rev. 509, 515 (Nov. 1982); Jayson, Chapter 8. The criteria advocated by plaintiffs, by rendering the assailants' employment status irrelevant, will actually avoid this quagmire.[11]

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[10] In fact, under the majority's ruling, the case could well be remanded for examination of this very issue, since the corpsman here was apparently off-duty at the time when he committed the assault. *See Thigpen*, 800 F.2d at 394 n.2 (court's conclusion that claim was barred by assault and battery exception obviated need to examine district court ruling on "scope of employment" requirement of 28 U.S.C. § 1346(b)).

[11] The majority asserts that the rule I would adopt would not eliminate an inquiry into the "scope of employment," but merely shift the inquiry to those employees whose alleged negligence allowed the assault to occur. I respectfully suggest that the majority misconceives the nature of the rule that I propose.

As explained *supra*, I read § 2680(h) to permit suits against the United States, in circumstances where a government employee has committed an assault and battery, whenever plaintiffs can isolate a government duty, and breach of that duty, independent of the government's status as employer. To satisfy this requirement, plaintiffs must establish a failure to perform adequately some duty which the government has either voluntarily assumed or had imposed upon it by legislative or executive order. In other words, plaintiffs must establish that government employees, acting within the scope—indeed obligations—of their employment, would have acted in a manner that could have averted the ensuing assault and battery. There is no place for an inquiry into whether particular negligent employees acted within the scope of their employment; indeed, the very basis of the plaintiff's case is a failure of any government employee so to act. This approach thus avoids the "scope of employment" quagmire which the majority's alternative invites.

Even if the preceding analysis were incorrect, it would be no indictment of the rule that I have proposed. At worst, this rule merely fails to eliminate the type of "scope of employment" inquiry that the majority concedes is necessitated by its approach. Thus, while my proposal may prove no easier to apply, it certainly entails no greater difficulties than the alternative advocated in the majority opinion.

Conclusion

The majority opinion reads the intentional tort exception to the FTCA, § 2680(h), in such a way as to make the employment status of the assailant determinative of when the United States will be liable for its negligent misconduct. The opinion gives short shrift to the factors isolated by plaintiffs for distinguishing this case from our earlier FTCA decisions. In so doing, it reaches a result that comports neither with logic, the statute, nor fundamental notions of equity. I thus respectfully dissent. I would reverse the judgment for defendant and remand the case for trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM85-775

MICHAEL N. SHERIDAN and MARY A. SHERIDAN

v.

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Plaintiffs bring this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Secs. 2671-2680, alleging that as a result of the government's negligence, they were shot at and injured by an off-duty Naval medical aide. The government has filed a motion to dismiss on the basis that the cause of plaintiffs' injuries was an intentional tort by a federal employee, and therefore, is explicitly excluded from the FTCA by Sec. 2680(h). Both sides have fully briefed the issue, and the court is now prepared to rule. No hearing is necessary. Local Rule 6.

FACTS

On February 6, 1982, after finishing his shift, United States Navy Medical Aide Robert Carr began drinking, and after allegedly consuming a considerable amount of alcohol, packed some belongings, including a rifle, into a uniform bag and left his quarters. Sometime before 9:00 p.m., three Navy corpsmen discovered Mr. Carr lying face down in a drunken stupor on the floor of the old hospital building at the Naval Medical Center in Bethesda, Maryland. The three corpsmen attempted to take Mr.

Carr to the emergency room of the hospital, but apparently he broke away, grabbing his bag, and revealing the barrel of his rifle. Later that night, Mr. Carr fired several rifle shots at a vehicle occupied by the plaintiffs, injuring them.

Plaintiffs allege that their injuries are due to the government's negligence, and that this negligence was twofold: (1) that the government failed to adequately supervise Mr. Carr, a person it knew or had reason to know was psychologically unstable; and (2) that it failed to enforce its rules and regulations which prohibit the keeping of firearms at the Naval Center.

Legal Analysis

The FTCA sets forth the circumstances under which the United States will waive sovereign immunity and accept liability for the tortious acts of its employees. 28 U.S.C. Sec. 1346(b) grants original jurisdiction over such claims to the United States District Courts. The law of the state in which the alleged tortious act occurred controls the nature of the conduct for which damages may be recovered.

Section 2680 of the Act, however, specifically excludes certain tortious conduct from coverage. Relevant to this case is Sec. 2680(h) which states, in part, that the provisions of the Act shall not apply to ". . . [a]ny claim arising out of assault [or] battery. . ." That is, when a government employee commits an intentional tort, the government does not waive its sovereign immunity.

The defendant argues that the events in this case clearly fall within the exclusion of Sec. 2680(h). Defendant asserts that the plaintiffs have alleged injuries resulting from an assault and battery by a federal employee, and as such, are precluded by Sec. 2680(h) of the Act from recovery against the government.

The plaintiffs concede that the general rule is that the government is not liable for the intentional torts of its employees. Plaintiffs argue, however, that this general rule does not apply here because it is not the intentional tort that caused the plaintiffs injuries, but the *negligence* of the government.

Thus, the question before this court is the scope of Sec. 2680(h), and whether it bars plaintiffs from maintaining this action against the government. "The applicability of Sec. 2680(h) is a threshold question in a suit such as this, and can be determined by the Court as a matter of law." *Hughes v. Sullivan*, 514 F. Supp. 667, 668 (E.D. Va. 1980), *aff'd*, *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981).

In analyzing the scope of Sec. 2680(h), there are three factual situations that must be distinguished.

The first factual situation is where A, a government employee, gets angry and hits B. If A were not a government employee, B would clearly have no cause of action against the government. However, because A is a government employee, B can sue the government under a theory of *respondeat superior*. Thus, the mere fortuity that A is a government employee gives B an action against the government. To avoid such a result, Sec. 2680(h) was included in the FTCA, specifically exempting the government from liability for the intentional torts of its employees. There is no dispute that this first factual situation falls within the exemption, and indeed, the legislative history of the FTCA indicates that this is exactly the type of situation with which Sec. 2680(h) was intended to deal.

> Congress was advised by the Department of Justice that the exception would apply "where some agent of the Government gets in a fight with some fellow . . . [and] socks him." Tort Claims. Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 33 (1942).

United States v. Shearer, 105 S.Ct. 3039, 3042 (1985).

The second situation is where C, a government employee, is negligent (for example, negligently failing to supervise those confined in a prison), and as a result, A assaults B. Courts have held that B can sue the government under the FTCA—not because of A's intentional act, but because of government employee C's negligence. *See Rogers v. United States*, 397 F.2d 12 (4th Cir. 1968) (Sec. 2680(h) is inapplicable when tortfeasor is not a government employee); *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954) (leading case on the issue).

The third factual situation is the one with which the courts have had difficulty. The facts are the same as in #2, above, except that A happens to be a government employee rather than a private citizen. This is the factual situation of the instant case, and plaintiffs argue that the results should not turn on the mere happenstance that Mr. Carr was a government employee, when the fact of his employment is irrelevant to the plaintiffs' claims.

Courts analyzing this third factual situation have split in their conclusions. Some find that the facts are similar to situation #1, and therefore there is no cause of action against the government. Other courts consider the facts to be much more similar to #2—the plaintiff is not suing the government because of the intentional act of A, a government employee, but rather because of the *negligence* of C (a government employee).

The courts that take the first view—that a cause of action against the government in negligence is barred if the injury is caused by an intentional tort of a government employee—read the language of Sec. 2680(h) broadly. "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes

any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a battery committed by a Government employee." *United States v. Shearer, supra,* at 3042. *Accord Hughes v. Sullivan,* 514 F. Supp. at 668-69.

These courts say that plaintiffs will not be permitted to circumvent the exclusion of Sec. 2680(h) through artful pleading. They note that, notwithstanding evidence of government negligence, the intentional conduct of the employee is an intervening cause of the plaintiff's injuries and thus, action is barred. (*See, e.g., Naisbitt v. United States,* 611 F.2d 1350 (10th Cir. 1980) (finding the intentional tort to be of such magnitude that, as a matter of law, it constituted an intervening force).

Finding the intentional act of a government employee to be an "intervening cause", however, does not explain why a different rule should result in #2 and #3. It appears more likely that courts are concerned that applying other than absolute rule barring actions whenever a government employee commits an intentional tort, will result in plaintiffs getting around the restrictions of Sec. 2680(h) by alleging some prior negligence by the government. (*See e.g., Naisbitt, supra* at 1355: "[A]n attempt to establish liability on a negligence basis is indeed an effort to circumvent the retention of immunity provided in Sec. 2680(h).")

Other courts have argued that the critical distinction is not between employees and nonemployees, but between on-duty employees and off-duty or nonemployees. They reason that Sec. 2680(h) was to protect the government from liability when a plaintiff had a cause of action against the government *solely* on a *respondeat superior* theory. However, when an employee commits a tort outside the scope of his duties, and for which no *respondeat superior* theory would apply, the plaintiff has no cause of action against the government unless the government has

been negligent in some way. Under these circumstances, the plaintiff's cause of action is not based on the intentional tort but rather on the negligence of the government. [For a detailed and thorough analysis of this position, see *Gale v. United States,* 491 F. Supp. 261 (D. S.C. 1980) (*Gale I*).]

The Third Circuit, using this approach in *Gibson v. United States,* 457 F.2d 1391 (3d Cir. 1972), denied the government's motion for dismissal based on Sec. 2680(h). In *Gibson,* plaintiff was a teacher at a Federal Job Corps Center who was assaulted by an enrollee at the Center. (The court considered the enrollee a federal employee.) The Center was to train dangerous, mentally ill young men who were known to be violent juvenile offenders, and the plaintiff alleged that the government was negligent in failing to take sufficient safety measures. In refusing to find the action barred by Sec. 2680(h), the court said:

> . . . the attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care *under the circumstances* and, therefore, it *is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.*
>
> "Here the very risk which constitutes the defendant's negligence is the probability of such action. It is clear that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm."
>
> Under the appellant's allegations, the injury arose out of the basic negligence of the United States and the attack was the foreseeable consequence of the original misconduct. "That the foreseeable danger

> was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. *Breach of that duty would be negligence.* . . ." Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence.

457 F.2d at 1395. (Emphasis in original) (citations and footnotes omitted). *See also Shearer v. United States*, 723 F.2d 1002, (E.D. Pa. 198), *reversed and remanded* (on other grounds), 105 S.Ct. 3039 (1985).

The approach taken by the Third Circuit requires the court to look beyond the identity of the intentional tortfeasor, and to focus on the government's behavior to decide whether it was a "cause" of the plaintiff's injury. Clearly an absolute rule has the advantage over the Third Circuit's approach, by being easier to apply, but it can cause illogical results.

For example, as the plaintiffs in this case point out, assuming that there was some negligence on the part of the government, if every other fact in this case was the same except that Mr. Carr was a private citizen instead of a government employee, the plaintiffs would have a cause of action against the government for its negligence. Because Mr. Carr is a government employee, however, the plaintiffs are barred by Sec. 2680(h). The plaintiffs urge the court to avoid this result by applying the reasoning of *Gibson*.

While the court is sympathetic to plaintiffs' request, it finds that it is bound by the Fourth Circuit's decision in *Hughes v. United States, supra*. In *Hughes*, a United States postal employee sexually assaulted a young girl while on a break between his two daily mail delivery routes. He was charged with taking indecent sexual liberties, and pled guilty to a lesser charge. The man continued to work as a mailman, and the father of the

molested child asked the postal supervisor to take the employee off of delivery routes so that he would not come into contact with children. The postal supervisor refused to do so, and subsequently, the mailman lured two girls into his truck while on his delivery route, and sexually molested them. The mother of the two girls sued the United States under the FTCA, claiming that the supervisor had been negligent in keeping the employee on the delivery route after he knew of the first sexual assault, and that the negligence was the proximate cause of the children's injuries.

The United States took the position that the *Hughes'* claim was grounded in the intentional tort of assault and battery and thus, excluded under 28 U.S.C. Sec. 2680 (h). The District Court agreed, holding that the federal government cannot be held liable in negligence for assaults by its employees. The Fourth Circuit affirmed the district court for the reasons stated in the District Court's opinion. The district court explicitly acknowledged that its result was in conflict with the Third Circuit's holding in *Gibson*.

To avoid the result in *Hughes*, the plaintiffs attempt to distinguish the facts in this case from those in *Hughes*. They argue that the assault in *Hughes* could have happened even without the negligence of the government, whereas in this case, "but for" the negligence of the government, Mr. Carr would not have had a gun and therefore could not have shot at the plaintiffs' car. But the court does not find this distinction to be meaningful: the plaintiffs in *Hughes* could have argued that "but for" the government's negligence in leaving the mailman on a delivery route, the assault on the two young girls would not have occurred.

Further support for the proposition that this court is bound in this case by the decision in *Hughes*, is the district court's opinions in *Gale v. United States*, (*Gale I*), 491 F. Supp. 574 (D.S.C. 1980) and *Gale v. United*

States, (*Gale II*), 525 F. Supp. 260 (1981). *Gale* involved the rape of the plaintiff by an off-duty Marine. The plaintiff alleged that the government was negligent in its medical treatment of the Marine and in its military supervision over him. In *Gale I*, the district court denied the government's motion for summary judgment. In a thoughtful opinion in which Judge Hawkins analyzed this problem, he concluded that the plaintiff's cause of action was based on the negligence of the government, and that as such, was not barred by Sec. 2680(h). After *Gale I*, the Fourth Circuit affirmed *Hughes* and when the government sought reconsideration of the denial of its motion, Judge Hawkins reversed his earlier decision and "reluctantly agree[d] that plaintiffs' claims had to be dismissed." The court said that "[t]here is no doubt that the Fourth Circuit in *Hughes* has now accepted the majority rule in refusing to allow an action against the government where the assailant is a government employee." *Gale II* at 261.

For the foregoing reasons, the court finds that plaintiffs' claims, "arising out of" an assault and battery, are barred by Sec. 2680(h).

Plaintiffs also argue that the government's motion to dismiss should be denied because there has been no showing that the firing of the shots that injured the plaintiffs was the result of the intentional tort of assault or battery. Specifically, plaintiffs assert that the medical aide who fired the shots might not have had the mental capacity (given his psychological state), to form the intent necessary to commit assault or battery.

However, assault under Maryland law requires only a general intent to do an act and not a specific intent to cause harm. *McGhee v. State*, 9 Md. App. 526 (1970). Likewise, the "intent to do harm is not essential to a battery. The gist of the action is not hostile intent on the part of the [tortfeasor], but the absence of consent to the contact on the [injured party's] part." *Ghassemieh v.*

Schafer, 52 Md. App. 31, 38 (1982). In addition, the court in *Ghassemieh* considered the argument that the same behavior could support a claim of battery or constitute gross negligence. Although the court agreed that the two were not mutually exclusive, it pointed out that in some areas of the law this was not true, such as actions brought under the FTCA. In such a case, the distinction between negligence and battery is maintained, and intentional conduct will be considered a battery. 52 Md. App. at 42, footnote 4.

For the foregoing reasons, it is this 10th day of December 1985, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant's motion to dismiss be, and the same hereby is, *Granted*; and

(2) that the Clerk of the Court mail copies of this Memorandum and Order to the parties.

/s/ Herbert F. Murray
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HM-85-775

MICHAEL N. SHERIDAN and MARY A. SHERIDAN

vs.

THE UNITED STATES

JUDGMENT

In accordance with the Memorandum and Order dated December 10, 1985 and filed in the above entitled case, it is

ORDERED and ADJUDGED:

1.) that defendant's motion to dismiss be, and the same hereby is "GRANTED".

Dated at Baltimore, Maryland this 10th day of December, 1985.

JOSEPH A. HAAS, Clerk

By: /s/ [Illegible]
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-626

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN AND
MARY A. SHERIDAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the exception in the Federal Tort Claims Act barring suits against the United States for "[a]ny claim arising out of assault [or] battery" (28 U.S.C. 2680(h)) bars a claim that the government negligently failed to prevent its employee from committing a battery.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

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MICHAEL N. SHERIDAN AND
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (Pet. App. 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An enlisted Navy medical aide at Bethesda Naval Medical Center, Robert W. Carr, fired several shots from a rifle into petitioners' automobile, injuring petitioner Mary Sheridan. Petitioners brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, alleging that the Navy had negligently failed to pre-

vent the battery by Carr. Specifically, they alleged that Carr had kept the rifle in his quarters at the Medical Center in violation of Navy regulations and that the Navy "knew or should have known" that fact (Complaint paras. 7, 9; C.A. App. 6-7).[1] They further alleged that Carr "had displayed instances of psychological instability in the past of such nature that the [Navy] knew or should have known that he posed a threat to the wellbeing and safety of others," but that the Navy "took no steps to quell this threat" (Complaint para. 8; C.A. App. 7).

Petitioners elaborated upon the allegations in their complaint in their supplemental opposition to the government's motion to dismiss (C.A. App. 9-20), which included evidence submitted at Carr's court-martial. Relying on that evidence, the district court stated: Carr began drinking after he finished his shift on February 6, 1982. At about nine o'clock that night, three Navy corpsmen found him, inebriated, in an old hospital building. Two of them supported Carr and the third took Carr's bag, and they attempted to take him to the emergency room. On the way there, Carr broke away, grabbed his bag, and reached into it, revealing a rifle barrel. The three corpsmen fled.[2] Carr then left the building and began shooting at passing vehicles. Bullet fragments struck Mary Sheridan, who was traveling in a car with her husband, Michael Sheridan. Pet. App. 20a-21a.

[1] There is no allegation or other indication in the record that either the rifle Carr used, which was a .22 caliber rifle (Pet. App. 2a), or his ammunition belonged to the military.

[2] Petitioners' complaint contained no allegation that the three corpsmen failed to notify security officers, although petitioners now state (Pet. 4), without citation, that the corpsmen did not "attempt to alert base security," but instead "simply fled, apparently without another thought." In fact, Carr's court-martial record shows that the corpsmen promptly notified a security officer. One of the three corpsmen, Nurse Florence Jackson, testified at the court martial that she immediately notified Timothy Uram, who was on security watch, of the danger. Uram testified that he promptly responded to the warning.

The district court granted the government's motion to dismiss (Pet. App. 20a-29a). It held that petitioners' action is barred by the intentional tort exception (28 U.S.C. 2680(h)), which provides in part that the government is not liable for "[a]ny claim arising out of assault [or] battery." The district court noted that Section 2680(h) bars respondeat superior liability of the government for a battery by its employee but does not bar claims that the government negligently supervised a person who is not a government employee. The courts are divided, the district court found, on whether Section 2680(h) bars claims that the government's negligence resulted in a battery by its *employee*. Pet. App. 22a-26a. It held that the controlling precedent in the Fourth Circuit (*Hughes* v. *United States*, 662 F.2d 219 (1981)) bars such negligent supervision claims (Pet. App. 26a-27a).[3]

A divided court of appeals affirmed (Pet. App. 1a-19a). The court held that *Hughes* and *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986), controlled. It found no merit to petitioners' attempt to distinguish those cases on the ground that Carr violated regulations by keeping the rifle in his quarters (Pet. App. 3a-4a). The court also rejected petitioners' argument that Section 2680(h) should not bar this action because the shooting had not been connected with Carr's job responsibilities. It held that Section 2680(h) bars all "actions alleging negligence of the supervising employees when the underlying tort is an assault or battery by a government employee" (Pet. App. 5a).

[3] The district court also rejected petitioners' argument that there had been no battery because Carr's drunkenness prevented him from having the requisite intent. The district court held that under Maryland law the intent required is only a "general intent to do an act and not a specific intent to cause harm" and that "the gist of the action is not hostile intent on the part of the [tortfeasor], but, the absence of consent to the contact on the [injured party's] part" (Pet. App. 28a (citations omitted)). Petitioners did not challenge this state-law holding in the court of appeals and they do not challenge it here.

Chief Judge Winter dissented (Pet. App. 6a-19a). In his view, "the government should be held subject to suit in all cases where its alleged liability is independent of the assailant's employment status—i.e., where a court can isolate a government duty and source of negligence that is based on something other than the fortuitous circumstance that the government happens to be the assailant's employer" (*id.* at 6a). Judge Winter also stated that Section 2680(h) should not be held to bar claims where the government's violation of a regulation constitutes negligence per se (Pet. App. 13a-18a).

ARGUMENT

The courts below correctly held that this action is barred by Section 2680(h) because petitioners' claim plainly arises out of the battery by Carr. This Court should grant certiorari, however, because the petition presents an important issue that was considered but not resolved in *United States* v. *Shearer*, 473 U.S. 52 (1985), and the conflict among the courts of appeals continues on this frequently-litigated issue. Moreover, the minority view advocated by petitioners would vastly increase the government's exposure to tort liability for the off-duty actions of its several million military and civilian employees.

1. In *Shearer*, the Court unanimously held (473 U.S. at 57) that *Feres* v. *United States*, 340 U.S. 135 (1950), barred the claim that the Army had negligently failed to control an off-duty serviceman, known to be dangerous, who kidnapped and murdered a fellow serviceman. The Court did not decide whether the intentional tort exception also barred the claim.[4] However, four of the eight

[4] The first question presented in the government's petition for a writ of certiorari in *Shearer* was whether the claim was barred by Section 2680(h).

Justices participating in the case concluded that Shearer's claim was barred by the intentional tort exception as well as by the rule of *Feres* (473 U.S. at 56).[5]

Chief Justice Burger's opinion for the plurality in *Shearer* correctly concluded that a claim arising out of a battery by a government employee is barred by Section 2680(h). As stated in that opinion, "Section 2680(h) does not merely bar actions *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery" (473 U.S. at 55 (emphasis in original)). Here, as in *Shearer*, "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of [petitioners' injuries] and, consequently, the basis of [their] claim" (*ibid.*). While finding the legislative history "sparse" (*ibid.*), the plurality concluded that it was consistent with the view that all claims arising out of "deliberate attacks by Government employees" would be barred, not simply respondeat superior claims. The plurality also drew support from the 1974 amendment waiving sovereign immunity for claims arising out of the intentional torts of law enforcement officers, noting that "[t]he premise of the legislation was that unamended § 2680(h) 'protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts such as assault and battery.' " *Id.* at 56 (quoting S. Rep. 93-588, 93d Cong., 1st Sess. 3 (1973)). Further, the plurality relied upon this Court's interpretation of the parallel exceptions in Section 2680 in *United States* v. *Neustadt*, 366 U.S. 696 (1961) (construing "misrepresentation" in 28 U.S.C. 2680(h)), and *Kosak* v. *United States*, 465 U.S. 848 (1984) (construing 28 U.S.C. 2680(c)), where the Court construed "arising out of"

[5] Justices White, Rehnquist, and O'Connor joined the portion of Chief Justice Burger's opinion concluding that Section 2680(h) barred Shearer's claim. Justices Brennan, Marshall, Blackmun, and Stevens did not join that portion of Chief Justice Burger's opinion, but did not separately address the issue (473 U.S. at 59-60). Justice Powell did not participate.

broadly (473 U.S. at 56).[6] All of those factors apply with equal force in this case and show that Section 2680(h) bars petitioners' claim that the government can be held liable for the injuries caused by Carr's battery.[7]

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[6] Petitioners mistakenly argue (Pet. 11-12, 13, 14-15) that *Block* v. *Neal*, 460 U.S. 289 (1983), supports their position. To the contrary, that case demonstrates that petitioners' claims are barred. The Court there, in distinguishing *Neustadt*, held that the plaintiff alleged two different claims, one of which did not arise out of a misrepresentation because "the Government's misstatements are not essential to plaintiff's negligence claim," so that that claim was not barred by the intentional tort exception (460 U.S. at 297). The battery to petitioners, however, is "essential" to their claim: but for the battery, the Navy's alleged negligent supervision of Carr would have caused them no injury. Thus, as the Court made clear in *Block* v. *Neal, supra*, their claim is barred by the intentional tort exception.

[7] Petitioners argue (Pet. 11-13) that this case is distinguishable from *Shearer* because (1) the government's violation of regulations constitutes negligence per se, and (2) the government's duty to protect petitioners is independent of its duty to supervise its employee Carr. There is no basis for petitioners' distinctions. As to the first point, the court below (Pet. App. 3a-4a) correctly held that the alleged violation of the Navy regulation prohibiting possession of firearms on base and requiring violations of this prohibition to be reported adds nothing to petitioners' case. Accord *Satterfield* v. *United States*, 788 F.2d 395, 398 (6th Cir. 1986). Petitioners, like Shearer, are attempting to "avoid the reach of § 2680(h) by framing [their] complaint in terms of negligent failure to prevent the assault and battery" (*United States* v. *Shearer*, 473 U.S. at 55 (plurality opinion)).

As to petitioners' second purported distinction of *Shearer*, the Navy owed no duty to petitioners that is independent of its duty to supervise its employee Carr. Petitioners contend (Pet. 12-13) that the government would have been liable if their assailant had not been a government employee, relying upon cases such as *United States* v. *Muniz*, 374 U.S. 150 (1963), and *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), which have held that Section 2680(h) does not prevent the government from being held liable for negligently failing to prevent intentional torts by inmates of prisons or mental hospitals. But, as the *Shearer* plurality explained, "[i]n enacting the Federal Tort Claims Act, Congress' focus was on the extent of the Government's liability

This Court's recent decision in *United States* v. *James*, No. 85-434 (July 2, 1986), also supports the result reached by the courts below. *James* involved 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." The court of appeals held that Section 702c did not bar claims by recreational users of reservoirs who were injured when the government negligently failed to warn them before opening gates to release flood waters. This Court reversed, holding that the plain language of the statute barred all liability for damages from flood waters. Under *James*, statutory preclusions of liability for specified injuries—damages from flood waters in *James* and injuries from intentional torts here—cannot be evaded by alleging that the injuries also resulted from the negligence of government employees. Indeed, from the government's perspective this case is stronger than *James* because Section 702c uses the phrase "*for* any damage from" instead of the broader phrase "arising out of" used in Section 2680(h).

2. Since *Shearer*, six courts of appeals have followed the plurality's construction of Section 2680(h). *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986) (barring claims of minor dependents of retired military personnel who were sexually assaulted by a medical corpsman while they were patients in a military hospital); *Miele* v. *United States*, 800 F.2d 50 (2d Cir. 1986) (barring claim arising when an AWOL serviceman threw acid into the face of a four-year-old boy); *Hoot* v. *United States*, 790 F.2d 836

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for the actions of its *employees*" (473 U.S. at 56-57 (emphasis in original)). Thus, although intentional torts by non-employees have been held beyond the scope of Section 2680(h), the *Muniz* and *Panella* line of cases provides no support for the exception petitioners would create.

(10th Cir. 1986) (barring claim arising out of physical assault upon a civilian woman by a soldier); *Metz* v. *United States*, 788 F.2d 1528 (11th Cir. 1986), cert. denied, No. 86-189 (Nov. 3, 1986) (barring claims of intentional infliction of emotional distress and invasion of privacy, even though these torts are not expressly specified in Section 2680(h)); *Johnson* v. *United States*, 788 F.2d 845 (2d Cir. 1986), cert. denied, No. 86-114 (Oct. 20, 1986) (barring claim arising out of a mailman's sexual assault upon a young girl); *Satterfield* v. *United States*, 788 F.2d 395 (6th Cir. 1986) (holding alternatively that Section 2680(h) barred the claim that negligent supervision and violation of regulations led to the off-post and off-duty murder of one soldier by other soldiers); *Garcia* v. *United States*, 776 F.2d 116 (5th Cir. 1985) (barring claim arising from a sexual assault by an Army recruiter upon a potential recruit).[8]

These decisions conflict with two decisions of the Third Circuit issued prior to this Court's decision in *Shearer*. *Shearer* v. *United States*, 723 F.2d 1102 (1983), rev'd on other grounds, 473 U.S. 52 (1985); *Gibson* v. *United States*, 457 F.2d 1391 (1972) (holding that Section 2680(h) did not bar claim by an on-duty Job Corps instructor who was stabbed by a Job Corps trainee, a government employee for FTCA purposes under 29 U.S.C. 1706(a)(3)).

[8] Even before *Shearer*, the majority of the courts of appeals had held that Section 2680(h) barred claims alleging that the government's negligent supervision of its employees had failed to prevent them from committing intentional torts. See, *e.g.*, *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980) (barring claims arising out of multiple murders, rapes, and other batteries by off-duty, off-post servicemen); *Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (barring claims arising out of kidnapping, sexual assault, and shooting by an off-duty serviceman); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981) (barring claim arising out of indecent sexual liberties with minors by an on-duty postman).

The Third Circuit has not reconsidered the issue since this Court's decision in *Shearer*. Three panels of the Ninth Circuit have rejected the analysis of the *Shearer* plurality, however; the government's petitions for rehearing en banc are pending in those three cases. *Morrill* v. *United States*, 821 F.2d 1426 (1987) (holding that Section 2680(h) does not bar the claim by a civilian go-go dancer that she was raped in a servicemen's club by an off-duty sailor as a result of the Navy's negligent failure to provide her a safe place to work); *Kearney* v. *United States*, 815 F.2d 535 (1987) (holding that Section 2680(h) does not bar claim on behalf of a civilian woman who was murdered on a military base by an off-duty soldier where the plaintiff alleged that the Army negligently allowed the murderer to violate his restriction to base); *Bennett* v. *United States*, 803 F.2d 1502 (1986) (holding that Section 2680(h) does not bar claims of students at an Indian boarding school who were sexually molested by a teacher allegedly negligently hired and supervised by the Department of the Interior).

These cases illustrate the frequency and variety of claims that have arisen concerning the proper construction of the intentional tort exception.[9] They also indicate the potentially vast exposure of the government to new tort liability if petitioners' view of Section 2680(h) were accepted. Since this case presents an important issue that is frequently litigated, and the courts of appeals are in conflict, review is warranted here to decide the question left unresolved in *Shearer*.

[9] Whether the government can be held liable when it negligently fails to prevent its employees from committing batteries is also at issue in two other pending court of appeals cases of which we are aware. *Doe* v. *Scott*, 652 F. Supp. 549 (S.D.N.Y. 1987), appeal pending, No. 87-6061 (2d Cir. argued Oct. 2, 1987) (alleging sexual molestation at military day-care center); *Doe* v. *United States*, No. 87-1436 (7th Cir. argued Oct. 1, 1987) (same).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
Attorney

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IN THE
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OCTOBER TERM, 1987

MICHAEL N. SHERIDAN AND MARY A. SHERIDAN,
Petitioners

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

IRVING KATOR
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, CHTD.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners

* Counsel of Record

January 14, 1988

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

Petitioners Michael N. Sheridan and Mary A. Sheridan file this supplemental brief in accordance with Rule 22.6, in order to bring to the Court's attention recent developments in two of the lower court cases cited in their petition for certiorari. The issue presented for review concerns the scope of the intentional tort exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h). Both petitioner and the United States have requested this Court to grant the petition for writ of certiorari based, in part, upon the need to resolve a split among the circuits that have considered that issue. *See* Pet. 5-10.

In three such cases pending in the Ninth Circuit, *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986); *Kearney v. United States*, 815 F.2d 535 (9th Cir. 1986); and *Morrill v. United States*, 821 F.2d 1426 (9th Cir. 1987), the government had filed petitions for rehearing and suggestions for rehearing *en banc*. *See* Pet. 8 n.5. On January 13, 1988, petitioners were informed that the Ninth Circuit has now denied the petitions in both *Bennett* and *Kearney*. That court has not yet acted on the petition in *Morrill*.

The United States concurs in the filing of this supplemental brief.

Respectfully submitted,

IRVING KATOR
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, CHTD.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners

* Counsel of Record

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BRIEF OF JOHN DOE ONE — JOHN DOE FORTY ONE (anonymous Hopi Indian Children) PLAINTIFFS IN THAT ACTION KNOWN AS JOHN DOE ONE, ET AL., v. THE UNITED STATES OF AMERICA NO. CIV 87-2110 PCT EHC, U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

JAMES P. CUNNINGHAM
JAMES P. CUNNINGHAM, P.C.
2700 Arizona Bank Building
101 North First Avenue
Phoenix, Arizona 85003
(602) 257-5100

Attorney for *Amici Curiae*

March 1, 1988

QUESTION PRESENTED

Whether the intentional tort exception of the Federal Tort Claims Act bars all suits against the United States which allege negligent failure to prevent an intentional tort, including cases in which the injury results from the government's breach of an affirmative duty to protect Indian school children where the source of the government's duty to prevent the injury arises independent of its status as the assailant's employer.

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BRIEF OF JOHN DOE ONE — JOHN DOE FORTY ONE (anonymous Hopi Indian Children) PLAINTIFFS IN THAT ACTION KNOWN AS JOHN DOE ONE, ET AL., v. THE UNITED STATES OF AMERICA NO. CIV 87-2110 PCT ECH, U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

The forty-one Indian children through their counsel herein submit this AMICI Curiae Brief to urge the Court to reverse the majority decision below and affirm the dissenting opinion of Chief Judge Harrison L. Winter so that the claim of the minor plaintiffs for breach of duty on the part of the United States may not in any way be impaired.

INTEREST OF AMICI

The Polacca Day School on the Hopi Indian Reservation in Arizona is a primary school operated by the Bureau of Indian Affairs of the United States Department of the Interior. On the campus premises and immediately adjacent thereto are apartments and houses for purposes of providing housing for teachers and the principal of the school. In 1978 the Bureau of Indian Affairs employed John W. Boone to be a primary teacher at the Polacca Day School on the Hopi Indian Reservation. This particular individual was a sexual deviant — a pedophile prone to acts of perversion and obscenity with young boys. He was given a residence on the school property, which residence was approximately 120 feet from the playground, 160 feet from the cafeteria and 250 feet from the classrooms building.

John Boone was arrested by the F.B.I. and charged with child molesting on March 11, 1987. He entered a plea of guilty on April 28, 1987. He was sentenced to life imprisonment and now resides in a federal prison in North Carolina. John Boone molested and committed various acts of perversion and obscenity on and with young school boys for a period of approximately nine years. The misconduct generally occurred at the residence of Mr. Boone. A chart was obtained from his residence at the time of his arrest which contained more than 140 names of young boys. His acquaintance with the victims resulted from the fact that he was a teacher at their school.

All the plaintiffs filed Federal Tort Claims against the United States alleging injury by John W. Boone. After these claims were denied, forty-one of the victims commenced a civil action in the U.S. District Court for the District of Arizona known as John Doe One, et al., v. the United States of America, No. CIV 87-2110 PCT EHC.

A stay order has been sought of their case by the U.S. Attorney for Arizona on the grounds that this court's decision will control the case of the Polacca students.

SUMMARY OF ARGUMENT

The United States Government has both a common law and a statutory duty to provide security to Indian children attending a B.I.A. primary school on the Hopi Indian Reservation and to protect students from harm by pedophiles residing upon the school premises and employed as teachers.

John W. Boone was a teacher employed by the B.I.A., and he taught fourth grade at the Polacca Day School. The fact of employment itself is not controlling in reference to the duty imposed upon the United States. Employment is a factor which must be taken into consideration insofar as how and why he had access to these children. Another factor is that he was provided a residence wherein he was housed virtually on the school premises. Finally, the continuation of his employment and residency over a period of approximately nine years is likewise a significant factor in the consideration of the duty and negligence of the United States.

The liability of the United States is predicated upon a failure of the United States to carry out both a statutory and a common law duty to protect the minor plaintiffs. The breach of this duty to safeguard these school children resulted in foreseeable injury to children of a young age.

ARGUMENT

I. There is a common law duty imposed upon the United States pursuant to 28 U.S.C. Section 2674 that requires the United States through its agency, the Bureau of Indian Affairs, to protect school children attending school at a B.I.A. day school on the Hopi Indian Reservation from pedophiles and/or sexually deviant school teachers employed by the United States and housed by the United States on the school premises.

28 U.S.C. Section 2674, Liability of the United States, states in part as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same

manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The State of Arizona has long recognized that a public school district is liable for its negligence in failing to exercise ordinary care which results in an injury to a student. *Chavez v. Tolleson Elementary School District*, 595 P.2d 1017 (Ariz. 1975).

Generally speaking, an injured party may recover from an employer if the person was injured by a negligently hired employee or a negligently retained employee. *Ponticas v. K.M.S. Investments*, 331 N.W. 2d 907 (Minn. 1983); a child molestation case, discussed the prevailing law and stated,

> "Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.
>
> * * *
>
> We can ascertain no substantial difference in imposing a duty on an employer to use reasonable care in the initial hiring from his duty to use that care in the retention of an employee." 331 N.W.2d at p. 911.

The United States has a clear common law duty to exercise reasonable care in the employment of teachers and to not employ a pedophile. The government must exercise reasonable care to remove such individuals from employment and from residing upon the school premises.

II. There is a statutory duty imposed upon the United States pursuant to the United States Code and Code of Federal Regulations that requires the United States through its agency, the Bureau of Indian Affairs, to protect school children attending school at a B.I.A. day school on the Hopi Indian Reservation from pedophiles and/or sexually deviant school teachers employed by the United States and housed by the United States on the school premises.

There are numerous federal statutes creating a duty on the part of the United States to provide appropriate protection for Indian children attending B.I.A. schools on the reservation. In order to appreciate the intent of these statutes and the regulations which create this duty, we quote as follows:

> 25 U.S.C. Section 174 (Superintendence by President over tribes west of Mississippi).
>
> 25 U.S.C. Section 231 (Enforcement of State laws affecting health and education; entry of State employees on Indian lands).
>
> 25 U.S.C. Section 271 (Employment of instructors for Indians), provides in part:
>
> "The President may, in every case where he shall judge improvement in the habits and condition of such Indians practicable, . . . employ capable persons of good moral character to instruct them . . . and for teaching their children in reading, writing and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties . . ."
>
> 25 U.S.C. Section 272 (Superintendent of Indian schools).
>
> 25 U.S.C. Section 292 (Suspension or discontinuance of schools).
>
> 25 U.S.C. Section 295 (Supervision of expenditure of appropriations for school purposes).
>
> 20 U.S.C. Section 1221f (Office of Indian Education), specifically provides:

"(a) There is hereby established, in the Office of Education, a bureau to be known as the 'Office of Indian Education' . . ."

25 U.S.C. Section 1902 (Congressional declaration of policy), provides in part:

"The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for removal of Indian children from their families . . ."

25 U.S.C. Section 2005 (Facilities construction), provides in part:

"The Secretary shall immediately begin to bring all schools, dormitories, and other facilities operated by the Bureau or under contract with the Bureau in connection with the education of Indian children into compliance with all applicable Federal, tribal, or State health and safety standards, whichever provide greater protection . . ."

25 U.S.C. Section 2006 (Bureau of Indian Affairs education functions), provides in part:

"The Secretary shall vest in the Assistant Secretary for Indian Affairs all functions with respect to formulation and establishment of policy and procedure, and supervision of programs and expenditures of Federal funds for the purpose of Indian education administered by the Bureau . . ."

* * *

(c) Functions of education personnel in Bureau agencies under direction and supervision of Director . . .

Education personnel located in Bureau agencies, who are under the direction and supervision of the Director of the Office, in accordance with the first sentence of subsection (b) of this section, shall —

(1) monitor and evaluate Bureau education programs, and

(2) provide technical and coordinating assistance in areas such as procurement, contracting, budgeting, personnel, and curriculum."

25 U.S.C. Section 2007 (Policies and procedures for implementation of transferred administrative functions; establishment, etc.), specifically provides:

"Within six months after November 1, 1978, the Secretary shall establish and publish in the Federal Register the policies and procedures which are necessary to implement the transfer of functions made under section 2006 of this title."

Pursuant to the mandate of Congress, certain written policies pertaining to Indian education were thereafter enacted and they can be found in 25 C.F.R. Part 32 — INDIAN EDUCATION POLICIES.

25 C.F.R. Section 32.1 Purpose and scope, provides in part:

"The purpose of this part is to state the policies to be followed by all schools and education programs under the jurisdiction of the Bureau of Indian Affairs . . ."

25 C.F.R. Section 32.2 Definitions, provides in part:

". . . (i) 'Day School' means a Bureau school offering an academic program and certain support services such as counseling, food, transportation, etc., but excluding residential care."

25 C.F.R. Section 32.3 Mission statement, provides in part:

". . . it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians . . . there is no resource more vital to such Tribes and villages than their young people and the Federal Government has a direct interest, as trustee, in protecting Indian . . . children, including their education. The mission of the Bureau of Indian

Affairs, Office of Indian Education Programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes . . . The Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal . . . village contexts."

25 C.F.R. Section 32.4 Policies, provides in part:

"In carrying out its Education mission, the Assistant Secretary for Indian Affairs . . . shall:

* * *

(b) *Student rights.* Ensure the constitutional, statutory, civil and human rights of all Indian . . . students . . .

(e) *Respect for family.* Promote, respect and defend the cohesiveness and integrity of the family, in Tribal . . . community, as they relate to the educational and social prerogatives of the Tribes

* * *

(s) *Planning, maintenance and use of facilities.*

(1) Ensure that the needs of the students and Tribal . . . community will receive first priority in the planning, design, construction, operation and maintenance of Bureau schools and residential facilities, rather than other considerations, such as ease of maintenance, and that these facilities assure a supportive environment for learning, living and recreation.

(2) Maintain all school and residential facilities to meet appropriate Tribal, State or Federal safety, health and child care standards. If a conflict exists in these standards, the Federal standard shall be followed; in the absence of a Federal standard, the Tribal standard shall be followed. In the case of conflict, any such Tribal health or safety standards shall be no greater than any otherwise applicable State standard."

25 C.F.R. Part 42, STUDENT RIGHTS AND DUE PROCESS PROCEDURES, provides in part:

"Section 42.1 Purpose.

The regulations in this part govern establishing programs of student rights and due process procedures in Bureau of Indian Affairs schools and in schools that are operating under contract with the Bureau of Indian Affairs.

* * *

Section 42.3, Rights of the individual student.

Individual students at Bureau of Indian Affairs schools have, and shall be accorded, the following rights:

(a) The right to an education.

(b) The right to be free from unreasonable search and seizure of their person and property, to a reasonable degree of privacy, and to a safe and secure environment."

25 U.S.C. Section 1901, Congressional findings, states in part,

"Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds —

* * *

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who

are members of or are eligible for membership in an Indian tribe . . ."

It is apparent there is a statutory duty on the part of the United States to protect Indian children attending B.I.A. administered schools from foreseeable harm. It is obvious that under both the common law and statutory duty, the Federal government must use reasonable care to insure that sexual deviants or pedophiles are not employed as school teachers, nor that they are retained as teachers if by chance they are employed, nor permitted to reside on school premises.

We know from psychiatry there is a high probability that a pedophile will molest and injure a young child.

> "The essential feature of this disorder (pedophilia) is recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months' duration involving sexual activity with a prepubescent child. The person has acted on these urges, or is markedly distressed by them. The age of the child is generally 13 or younger . . .
>
> * * *
>
> People with this disorder who act on their urges with children may limit their activity to undressing the child and looking, exposing themselves, masturbating in the presence of the child, or gentle touching and fondling of the child. Others, however, perform fellatio or cunnilingus on the child or penetrate the child's vagina, mouth, or anus with their fingers, foreign objects, or penis, and use varying degrees of force to achieve these ends . . .
>
> * * *
>
> The course is usually chronic, especially in those attracted to boys. The frequency of pedophilic behavior often fluctuates with psychosocial stress. The recidivism rate for people with Pedophilia involving a preference for the same sex is roughly twice that of those who prefer the opposite sex." DSM-III-R, (American Psychiatric Association, Wash., D.C., 1987.)

Clearly, a pedophile employed as a teacher at the Polacca Day School is a clear and present danger to any child attending that school.

The plaintiffs from the Polacca Day School do not rest their claims upon various acts of child molesting, ergo, individual assaults. These are claims of the failure of the United States to perform its duty to protect school children from a known injury.

In *Shearer v. United States of America*, 723 Fed. 2d 1102 (3rd Cir. 1984), it was stated by the Court of Appeals,

> "The FTCA does not necessarily bar a cause of action in negligence, even if the injury is directly caused by the assault and battery of a government employee. The FTCA simply requires that the intentional tort must 'have its roots in government negligence.' " 723 F. 2d at p. 1106.

Shearer later was reviewed by the U.S. Supreme Court, *United States v. Shearer*, 473 U.S. 52, 87 L. Ed. 2d 38, 105 S. Ct. 3039, (1985). We submit it is factually distinguishable from the claims of the Hopi School children. Justice Burger confirms a difference in his opinion.

> ". . . By whatever name it is called, it is a decision of command. The plaintiffs in Feres and Stencel Aero Engineering did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondents attempt to hale Army officials into court to account for their supervisions and discipline . . . must fail." 87 L.Ed. 2d, at p. 45.

The duty to protect Indian children from teachers who are pedophiles in no way involves "sensitive military affairs." Accordingly, the U.S. Supreme Court opinion in *Shearer* is not controlling.

The Ninth Circuit recently considered a case involving a school teacher on the Navajo Reservation who kidnapped and sodomized some young boys. The opinion of *Bennett v. United States of America*, 803 F. 2d 1502 (9th Cir. 1986), contains appropriate rationale.

> "... the policy underlying subsection 2680 (h) was to insulate the government from liability for acts it was powerless to prevent or which would make defense of a lawsuit unusually difficult ... This claim is likewise not founded upon *respondeat superior*, but upon the same kind of negligent supervision, after notice, ...
>
> * * *
>
> ... To construe the assault and battery exception to defeat claims based on negligence when the negligence amounts to almost reckless disregard in the hiring and the placement of a known sex offender in charge of children would violate 28 U.S.C. Section 2674 (1982) by treating the federal government differently from private entities hiring and supervising teachers." 803 F. 2d at p. 1504.

We would also direct this Court to the dissent by Judge Harrison L. Winter in *Sheridan v. United States of America*, 823 F. 2d 820 (4th Cir. 1987),

> "... I think that the government should be held subject to suit in all cases where its alleged liability is independent of the assailant's employment status — i.e., where a court can isolate a government duty and source of negligence that is based on something other than the fortuitous circumstance that the government happens to be the assailant's employer." 823 F. 2d at p. 823.
>
> "... The test to be applied is straightforward: would the government be liable if the assailant was not a government employee? If yes, Section 2680 (h) is not applicable." 823 F. 2d at p. 823.

CONCLUSION

For the foregoing reasons, it is requested that the majority judgment and opinion of the Court of Appeals be reversed and the dissenting opinion of Chief Judge Harrison L. Winter be adopted and confirmed as the appropriate law of this case.

Respectfully submitted,

JAMES P. CUNNINGHAM
JAMES P. CUNNINGHAM, P.C.
2700 Arizona Bank Building
101 North First Avenue
Phoenix, Arizona 85003
(602) 257-5100

Attorney for *Amici Curiae*

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No. 87-626

IN THE

Supreme Court of the United States

October Term, 1987

MICHAEL N. SHERIDAN
and
MARY A. SHERIDAN,
Petitioners,

vs.

THE UNITED STATES

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Roy B. Ward*
Martha Blue
WARD & BLUE
Post Office Box 789
Flagstaff, Arizona 86002
(602) 774-2773

Dale Itschner
121 East Birch Avenue
Suite 505
Flagstaff, Arizona 86001

Counsel for Amicus

**Counsel of Record*

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STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 1346 (b) provides, in pertinent part:

> Subject to the provisions of Chapter 171 of this title [28 USC § 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee for the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680 provides, in pertinent part:

The provisions of this chapter and § 1346 (b) of this title shall not apply to—

* * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract right: Provided, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and § 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, ''investigative or law enforcement officer'' means any officer of

the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

Title 28 USC § 2674, provides, in pertinent part:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages.

STATEMENT OF INTEREST OF AMICUS

Pursuant to Rule 36.2 of the Rules of the United States Supreme Court and the written consent of the Parties, (attached in the Appendix hereto), this Amicus Brief is submitted on behalf of eight young men (and their parents) who, as young boys were molested, sexually assaulted, and abused as a direct and proximate result of the negligence of various employees or agents of the United States Government acting within the course and scope of their employment. This Amicus Brief is submitted on behalf of the Plaintiffs in *Bennett, et al. v. United States,* 803 F.2d 1502 (1986), one of three cases in which the Ninth Circuit recently decided that claims based on the types of issues presented in the case before the Court, *Sheridan, et al. v. U.S.,* 823 F.2d 820 (1987), were not barred by 28 USC § 2680(h); and it is for that reason that this Amicus has an interest in this Court's resolution of *Sheridan, supra,* because the decision in *Sheridan, supra,* may ultimately effect the final outcome of *Bennett, supra,* in spite of the opinion of the Ninth Circuit. Furthermore, the *Bennett* case provides this Court with an excellent example of why these types of cases must be resolved pursuant to basic tort principles, as required by the Federal Tort Claims Act, whether by application of the "separate and independent duty" analysis, or the "negligent hiring and supervision" concepts; and why to do otherwise leads to the absurd results which occur if only the employment status of the person who inflicts the immediate injury is considered.

Any decision of the "question presented" in *Sheridan, supra,* and every "subsidiary question fairly included therein," U.S. Supreme Court Rule 21.1(a), must be decided in the best public policy tradition of this Court. Any broad and inartful stroke, such as the dicta in *Shearer v. United States,* 473 U.S. 52 (1985), which unfairly and improperly summarily denies

injured persons, otherwise entitled to recover pursuant to the Federal Tort Claims Act the opportunity to establish the essential elements of their claim at trial, pursuant to a misinterpretation of 2680(h), does those claimants an injustice and our society a disservice, as such a decision would be legally incorrect.

SUMMARY OF ARGUMENT

The United States is liable pursuant to the Federal Tort Claims Act in the same manner and to the same extent as a private person under like circumstances. 28 USC § 2674. A private person would be liable to Plaintiffs such as the Plaintiffs in *Bennett, et al. v. United States, supra,* in Arizona, "the place where the act or omission occurred," 28 USC § 1346(b), if the tort claimants carry their burden of proof and establish the elements necessary to prevail on a negligence claim in Arizona.

Inconsistent results among States and Circuits are anticipated and inevitable within the Federal Tort Claims built-in scheme of things. It is this peculiar aspect of these 2680(h) cases to which this Court should pay particular attention.

It is too easy to get side-tracked with the subsidiary issues in these cases such as the "special duty" or "independent duty" considerations; the negligent hiring or supervision of an "employee" versus a third person non-government employee; the on-duty, off-duty business. Indeed, the analysis of and reliance upon one or more of these various considerations has only served to confuse the basic question in the past. Certainly a correct and proper analysis and resolution of these subsidiary issues should be undertaken to the extent necessary to resolve the basic question underlying these types of cases, but the basic question presented should not be left unanswered in favor of a continuation of one of the exceptions which has

been created and carved out in the law when dealing with the difficult situations created by 2680(h), or more accurately, a misunderstanding of 2680(h).

But 2680(h) is not and should not be a bar to injured persons whose claims arise out of the negligence of government employees, and this Court should say so. Such a holding will in no way deprive the Government of the intended immunity for claims arising out of assault, battery, false imprisonment, etc. Only in those cases where the antecedent negligence can be established by the Plaintiff as a proximate cause of his injury will he be entitled to recover. And only in those cases where he can establish that the assault and battery (the immediate cause of his injury) was foreseeable will he be able to establish all of the elements necessary to recover on a claim based in negligence.

Proof of negligence by the Plaintiff may well require the consideration of the numerous subsidiary issues of "notice," "independent duty," "negligent hiring or supervision," "employee," "non-employee - third party," "on-duty," "off-duty," and perhaps other matters; but those issues must be resolved within the framework of a correctly analyzed opinion from this Court holding that the United States is liable for negligence according to the substantive law of negligence of the place where the act or omission occurred, pursuant to the Federal Tort Claims Act, in the same manner and to the same extent as a private person under like circumstances; the mere fortuitous presence of an assault and battery should not, in and of itself, have any effect upon the negligence claim, and most certainly should not provide the basis for a summary disposition of the claim.

ARGUMENT

I. FACTUAL BACKGROUND OF BENNETT, ET AL., V. UNITED STATES, SUPRA

The claimants,[1] under the FTCA in Bennett, are the parents of and the eight Navajo boy children who were victimized by acts of molestation and/or sexual assaults perpetrated by one Terry Lee Hester, a Bureau of Indian Affairs employee at the remote Kaibeto Boarding School in the interior of the Arizona portion of the Navajo Indian Reservation, said acts primarily occurring either at Hester's living quarters or a classroom located on the Kaibeto Bureau enclave primarily during Hester's off-duty hours. Hester was convicted in an Arizona district court of violation of criminal statutes on eleven counts for his actions perpetrated on the plaintiffs.

The undisputed facts are as follows:

When Mr. Hester applied for employment with the BIA, he listed on his SF-171 application for Government employment a prior Oklahoma charge of "outrage to public decency" which charge had resulted from similar conduct. Notwithstanding this disclosure, the BIA made no effort to determine the nature of this charge and proceeded to hire Mr. Hester and place him in a position of trust vis-a-vis young students in a

[1]These Amici cases arise from the U.S. District Court for the District of Arizona, from which the Plaintiffs appealed the granting of the government's motion to dismiss; therefore, all facts as pleaded by the Bennetts must be accepted as true. In any event, all the facts relied upon by the Bennetts, et. al., were garnered either through discovery or upon examination of the record of the criminal trial. Accordingly, it is doubtful that the government could contest any of the Bennetts' allegations.

BIA boarding school. Hester was hired as a teacher at the Kaibeto Boarding School at Kaibeto, Arizona, for the school year 1980-1981.

The United States Government had been put on notice of Hester's criminal propensities by Mr. Hester's disclosure of prior charges or offenses for sexual misconduct with minors on his employment application; yet the Government hired him and placed him in a position of trust and responsibility towards the Plaintiffs, allowing him free access to his victims.

Further, the government subsequently failed and refused to properly supervise Hester's activities and negligently allowed these activities to continue dispite having been put on notice and despite obvious signs of misconduct, such as a parent's complaint that her son had been sexually molested, as well as repeated and frequent incidents of Mr. Hester checking boys of a certain age group out of the dorm, and the continual procession of young boys in and out of his residence.

Despite this, the government negligently awarded a renewal contract to Mr. Hester, which meant that he was permitted to continue his employment at the school in the fall of 1981.

II. THE GOVERNMENT'S INDEPENDENT DUTY TO THE BENNETT PLAINTIFFS.

The government breached its duty to the then minor Navajo children by failing to provide a safe environment and to watch over and protect the minors from harm and injury.

The significance of the status of the boys as Indians and particularly Navajos comes into play in the panoply of Federal statutes relative to the education of Indians and the operation

of boarding schools as well as the special Treaty duty afforded members of the Navajo Tribe of Indians regarding education.[2]

The federal government represented to the Plaintiff parents in *Bennett* that instructors of good moral character would be employed, 25 USC § 271, that the Superintendent of Indian Schools would visit and inspect the schools for defects and establish standards for basic education of Indian children in Bureau Schools, 25 USC § 2001; establish national criteria for dormitories including counselling and privacy, 25 USC § 2002; regulatory requirements for educators, 25 USC § 2011; develop Bureau education policies, practices and procedures, 25 USC § 2013; and develop rules and regulations to insure the constitutional and civil rights of Indian students, 25 USC § 2017. Further, regulations adopted in 25 CFR Part 32, Indian Education policies set forth a plethora of duties

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[2]Treaty between the United States of America and the Navajo Tribe of Indians concluded June 1, 1868, ratification advised July 25, 1868; proclaimed August 12, 1868 (15 Stat. 667) of which Article VI states that the United States would provide education of the Navajos "in order to insure the civilization of the Indians," and required the government to provide a competent teacher and attendance was compulsory. The Treaty provides in part as follows:

> " . . . and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher."

Originally, this duty was a treaty obligation, subsequently voluntarily undertaken by Congress. See the Snyder Act, 25 USC § 12.

It has also been recognized by the United States Supreme Court that pursuant to Treaty obligations with the Navajo Tribe, the Federal Government has a duty to provide education and other services needed by Indians. See *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 690 (1965).

including compulsory school attendance for Indian children, use of federal Indian school facilities for community activities, development of policies reflecting the best interests of the student, student rights including freedom from cruel and unusual punishment, promotion of respect for the family, and so forth.

The actual incidents by Hester ranged from fondling the boys' genitals, forcing them to perform fellatio on him, writing obscenities on a boy's body after forcing him to disrobe, attempted anal penetration of one boy with a wooden support rod projecting from a plant, and forced acts of sodomy.

III. ANALYSIS OF STATUTORY PROVISIONS AND STATE LAW

The Federal Tort Claims Act renders the United States liable for torts essentially in the same manner and to the same extent as an individual, in like circumstances, under the law of the state where the wrong occurred. *Ravonier, Inc. v. United States*, 352 U.S. 315 (1957). The law of the state in which the negligent act occurred is the applicable law. 28 USC § 1346(b), 28 USC § 2672. The law in Arizona, as developed in the body of this brief both as to duty and causation mandates recovery by these tort claimants if the tortfeasor were a private individual.

A. THE GOVERNMENT'S RELIANCE ON THE INTENTIONAL TORT EXCEPTION TO FTCA JURISDICTION IS MISPLACED

1. *The History of the Act Does Not Support That Proposition.*

The legislative history of the intentional tort exception is meager and points out the concern that it was meant to

except certain torts which "would be difficult to make a defense against, and which are easily exaggerated." *Tort Claims Against the United States: Hearings on S. 2690 Before the Sub-Comm. On S. 2690 of the Senate Comm. on the Judiciary,* 76th Cong. 3d Sess. 39 (1940) referring to the fear that the judgment would exceed the damages suffered and that the government's concern was liability for deliberate torts; but not to preclude any "injury caused by negligence [which] could [still] be considered under the bill." S. REP. No. 1400, 79th Congress 2d Sess. 33 (1946) from a statement by an Assistant Attorney General.

One must remember that the FTCA was congressionally framed with negligence liability in mind, and given that foundation, there is little difference between a situation where a government employee with a history of traffic citations drives a government vehicle through a stoplight on her way to an official meeting and crashes into an innocent victim's car (essentially a battery) causing injuries for which liability and jurisdiction for a Federal Tort Claim has always existed, and the situation where a government employee with a molesting background is hired and retained in a boarding school situation that ultimately erupts into mass child molestation, with the exception that in the former there is also negligence on the part of the Government employee who is the immediate cause of the injury.

In fact, the Legislative history reflects Congressional concern over unforeseeable and therefore unpreventable assaults and batteries, not the situation where the injury was occasioned by what at common law would be an assault and battery, but is legally and realistically the foreseeable, and perhaps inevitable result of negligence. There exists historically and traditionally those situations in which the difference between the legal proximate cause and the immediate cause of an injury has been recognized. That is to say, legally there may be more than one proximate cause of an injury.

2. *The "Arising Out Of" Language of 2680(h) Should Appropriately Be Interpreted To Encompass Preceding and/or Concurrent Negligence.*

Arizona has long held that there may be more than one proximate cause of an accident if each was an efficient cause without which resulting injuries would not have occurred, *McDowell v. Davis,* 104 Ariz. 69, 448 P.2d 869 (1968); and has refused to allow a defendant to avoid liability for his causative act by claiming that the conduct of some other person was also a contributing cause. *Ontiveros v. Boark,* 136 Ariz. 500, 667 P.2d 200 (1983). The foreseeability of an intervening act also does not relieve the original actor from liability. *Ontiveros, supra.*

Not all acts are superceding causes.

It is unclear from the language of § 2680(h) that Congress intended by its phrase "arising out of an assault, battery . . . etc." to bar any and all claims alleging government negligence, just because the last act prior to the injury was an assault and battery. See Comment, *Sec. 2680(h) of the Federal Tort Claims Act: Government Liability for Negligent Failure to Prevent an Assault and Battery by a Federal Employee,* 69 Geo. L. J. 803. That seems improbable, given the purpose of the FTCA to provide a remedy to citizens injured by governmental negligence in circumstances in which the same act of negligence would impose liability under state law, but for governmental immunity. The interest of the government in non-liability for acts it could not prevent should not lead to an overly broad definition of "arising out of" to shield the government from liability just because an assault and battery is part of the sequence of events. The charge that a narrow interpretation would make the defense of these lawsuits unusually difficult likewise is spurious when applied to how the "arising out of" language should be interpreted. After all,

it is difficult to envision why the government would have more difficulty in defending a case where negligence is a proximate cause of the injury occurring by an assault and battery, than defending a claim where only negligence is the proximate cause of the injury. Even a simple claim for negligence could include multiple negligent acts that cause a claimant's injury. This Court's ultimate interpretation of § 2680(h) should not create a jurisdictional bar to Plaintiffs' claims, because under 2680(h) the Plaintiff/claimant still must establish a duty and the breach thereof. And it is at that point that many claims will falter and fail.

Shouldn't the language "arising out of" be construed narrowly, rather than broadly, to insure that 2680(h) is applied only to claims where the very gist and essence of Plaintiffs' theory of recovery is one of the excepted basis of liability. F. Harper & F. James, *The Law of Torts,* § 29.13 (1956).

B. THE COURT MUST DETERMINE THE GIST OF THE CLAIM

The federal courts have rightly attempted to properly characterize a claim not "merely by the artistry of pleading," but whether the negligence of the government can constitute a proximate cause for an injury which stems from the intervening tortious conduct of another. Courts examine the concept of foreseeability. Where the risk or likelihood of harm is foreseeable, then the government's negligence can be said to be a proximate cause of Plaintiffs' injury and therefore it is not a "situation where a Plaintiff by virtue of artful pleading seeks to circumvent 2680(h)." *Loritts v. United States,* 489 F. Supp. 1030 (D. Mass. 1980) p. 1031. See Restatement (Second) of Torts § 449 (1965) which specifically states if

> "the likelihood that a third person may act in a particular manner is the hazard . . . which makes the actor negligent, such an act whether . . . intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

This restatement principle has been quoted with approval and followed in Arizona. See *Campbell v. City of Tucson,* 4 Ariz. App. 155, 418 P.2d 401, 403 (1966). The Courts should look to see whether the intentional tort involved in a tort claimant's claim is rooted in the government's negligence. Some claims only collaterally involve an assault and battery. See *Rogers v. United States,* 397 F.2d 12 (4th Cir. 1968). In those cases, properly rooted in the government's negligence, there will often be a multitude of negligent events and ongoing wrongs or negligence.

How else in the *Bennett* case would a person of Hester's proclivities have had access to the number of Navajo children that he did over the period of time he did without this rootedness in the government's own negligence. To conclude otherwise, is to conclude that the government can say to these parents and these students and all others similarly situated, that they must send their children to school or be subject to criminal prosecution, but at the same time, the government may knowingly and negligently hire molestors, murderers, and others and deny the parents and the students recovery for wrongs such employees may inflict on the children.

The foregoing comments emphasize the importance of a court looking behind the acts of the assaulting employee to determine whether negligence of other government employees created th occasion for the assault.

In determining the "gist" of the action or claim, or its "essence," the court, against the background of state law, must evaluate the actors, the location of the various incidents, the duties owed, the number and frequency of incidents, and view the intentional act in its proper perspective relative to the antecedent negligence.

C. THE PLACE OF THE ACT DETERMINES WHETHER AN INTENTIONAL TORT BARS RECOVERY.

The first feature of 28 USC § 1346(b) (1970) is language providing that claims are permitted for a "wrongful act or omission." Intentional tort claims fall within that clause. The last phrase of 1346(b) establishes the governing law, i.e. "in accordance with the law of the place." Thus, it does not create new causes of action but it provides government liability for employee misconduct when such misconduct constitutes an actionable wrong under the law of the state where it occurred, subject to other restrictions or limitations of the Tort Claims Act. I. L. Jayson, *Handling Federal Tort Claims: Administrative & Judicial Remedies,* § 217.01 (1974).

The law of the place of the tort envisioned by the Federal Tort Claims Act will result in imperfect uniformity in its application by referring the determination of liability to different jurisdictions. 28 USC § 1346, 2671, et seq., *Winston v. United States,* 305 F.2d 253 (2d Cir. 1962). Under the law of the place in *Bennett, supra,* Arizona, the questions of duty and intervening criminal acts are resolved in favor of the tort claimants as far as not allowing 2680(h) to jurisdictionally bar the claims.

A negligence action may be maintained only if there is a duty or obligation, recognized by law, which, in Arizona, requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risk of harm, *Markowitz v. Arizona Parks Board,* 146 Ariz. 352, 706 P.2d 364 (1968), and that question obviously focuses on the relationship between the parties involved. *Contempo Construction Co. v. Mountain States Telephone & Telegraph Co.,* 153 Ariz. 279, 736 P.2d 13, (1987). *Markowitz, supra,* established duties to minors using a state recreational area and these duties

included an affirmative duty to use reasonable care to make the premises safe for use by the minors. The duty to the plaintiff usually arises out of the relationship between the plaintiff and defendant but it may also arise out of a relation between the defendant and a third party whose conduct contributed to plaintiff's injury. *Ontiveros, supra.* It is the law in Arizona, as well as the general rule, that school authorities have the duty to exercise ordinary care in protecting and supervising students on the school grounds and in other areas where students are under the control of school authorities. State law sets forth a variety of duties to students including an obligation of the governing board to visit each school to examine its management, condition and needs, provide for discipline against teachers, and provide for supervision over students. Arizona Revised Statutes § 15-341 and 342; also, teachers must comply with certain duties. Arizona Revised Statutes § 15-521.

A public school district in Arizona is liable for negligence when it fails to exercise ordinary care under the circumstances. *Morris v. Ortiz,* 103 Ariz. 119, 437 P.2d 652 (1968), and as invitees the schools have a duty to make the premises reasonably safe for the students' use. *Vreeland v. State Board of Regents,* 9 Ariz. App. 61, 449 P.2d 78 (1969).

Not only does the state posit the duty but also the law on proximate cause. In Arizona, as is usually the case, negligence requires not only the defendants be negligent, and remember on FTCA claims the defendant is the government, but that the negligence be a proximate cause of the injury complained of. *Stearman v. Miranda,* 97 Ariz. 55, 396 P.2d 622 (1964). Proximate cause has been defined by Arizona courts as that which, in a natural or continuous sequence, unbroken by any efficient, intervening cause, produces the injury and without which the injury would not have occurred. *Flowers v. K-Mart Corp.,* 616 P.2d 955, 126 Ariz. 495 (1980). The act in question need not be the sole cause of the injury but it is sufficient if

it only be a legal cause and where the injury is caused by concurrent effect of two separate wrongful acts, each of them is a proximate cause of the injury, and neither can operate as efficient intervening cause with regard to the other, and neither wrongdoer can escape liability. *Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949).

Arizona follows the Restatement in the absence of Arizona law to the contrary. *Koepke v. Carter Hawley Hale Stores, Inc.*, 140 Ariz. 420, 682 P.2d 425 (1984).

Under the Restatement of Torts, Second, § 448 (1965), page 480:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.* (Emphasis added.)

It is well established that the negligence of a defendant which leads predictably, proximately, and foreseeably to the commission of a criminal act is actionable. *Jablonski by Pahls v. United States*, 712 F.2d 391 (9th Cir. 1983); *Bonsignore v. City of New York*, 683 F.2d 635 (2d. Cir. 1982); *Abdallah v. Caribbean Security Agency*, 557 F.2d 61 (3d Cir. 1974); *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981). This is also the law of Arizona, see *Jesik v. Maricopa County Community College District*, 125 Ariz. 543; 611 P.2d 547 (1980).

Under Arizona law, the general principle of foreseeability is applied to intervening criminal acts. *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977), and independent criminal acts of a third person, if foreseeable, are not

superseding causes. *Central Alarm of Tucson v. Ganem*, 116 Ariz. 74, 567 P.2d 1203 (1977).

In order for the court to judge whether the government was negligent in allowing an intentional tort to occur, the foreseeability of the intervening act is emphasized. Eldridge, *Culpable Intervention As Superseding Cause*, 86 U.Pa. L. Rev. 121, 25 (1937). Today, this principle is best set forth in the Restatement (Second) of Torts § 449. To establish the actor's (i.e., the Government's) negligence, there must be a duty to prevent the intervening assault. This duty flourishes particularly in those situations where there exists special relationships between the government (actor) and the party committing the intervening intentional act or the injured person. Harper & Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886 (1934). Such relationships are varied: employer/employee, parent/child, landlord/tenant, law officers/in-custody person, property owner/invitee, school/student and so forth.

The law of the place needs to be examined for a duty mandated by the special relationships. In *Bennett, supra*, various duties have been postulated under federal and state law and were breached.

In *Bennett, supra*, the government's negligence, especially in consideration of the cloistered environment of a boarding school and the duty to protect the children, set the stage for the natural, foreseeable result which inevitably occurred, and the government is the only party who could have created the situation. See *Jesik, supra*. There a student was shot by someone who threatened him, and the student had received assurances from the security guard that he would be protected. The court held that Arizona law imposes a specific duty to protect students against such torts.

The proper test is the duty/causation analysis. The *Bennett* complaint alleges facts which would support a finding that the government's negligence was the proximate cause of the

Plaintiff's injuries under Arizona law where intervening criminal acts or intentional ones do not sever antecedent negligence as the proximate cause of the injury.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit Court of Appeals in *Sheridan v. United States*, 823 F.2d 820 (1986), should be reversed and the case remanded for trial to the United States District Court for the District of Maryland pursuant to the Opinion of this Court that these Federal Tort Claims cases, involving intentional torts, are not to be dismissed summarily on the basis of Motions To Dismiss or Motions For Summary Judgment citing 28 USC § 2680(h) in the face of well plead claims for negligence pursuant to the substantive traditional tort law and principles of the place where the act or omission occurred. Plaintiffs with such claims are entitled to their day in Court.

Respectfully submitted,

ROY WARD*
MARTHA BLUE
WARD & BLUE
Post Office Box 789
Flagstaff, Arizona 86002
(602) 774-2773

DALE ITSCHNER
121 East Birch Avenue
Suite 505
Flagstaff, Arizona 86001

Counsel for Amicus

March 1, 1988

*COUNSEL OF RECORD

APPENDIX

LAW OFFICES
KATOR, SCOTT & HELLER
CHARTERED
SUITE 900
1029 VERMONT AVENUE, N. W.
WASHINGTON, D. C. 20005
(202) 393-3600

February 16, 1988

Roy B. Ward, Esq.
Ward & Blue
601 North Humphreys Street
Post Office Box 789
Flagstaff, Arizona 86002

Re: *Sheridan v. United States*, No. 87-626

Dear Mr. Ward:

The petitioners, Dr. and Mrs. Sheridan, consent to your filing a brief *amici curiae* on behalf of the plaintiffs you represented in *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986). The Clerk has advised me that no extensions of time to submit briefs will be available. Thus our brief, as well as your *amici* brief, will be due on March 4, 1988.

Very truly yours,

Michael J. Kator

MJK:nbi

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 22, 1988

Roy Karl, Esquire
Karl & Blue
601 North Humphreys Street
Post Office Box 789
Flagstaff, Arizona 86002

Re: Sheridan v. United States
No. 87-626

Dear Mr. Karl:

With regard to your letter of February 10, 1988, I hereby consent to the filing of an amicus brief on behalf of the plaintiffs in the case of Bennett v. United States, 803 F.2d 1502 (9th Cir. 1986).

Sincerely,

Charles Fried
Solicitor General

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-626

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN AND MARY A. SHERIDAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the exception in the Federal Tort Claims Act barring suits against the United States for "[a]ny claim arising out of assault [or] battery" (28 U.S.C. 2680(h)) bars a claim that the government negligently failed to prevent its employee from committing a battery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (Pet. App. 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 16, 1987, and was granted on January 19, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdic-

tion of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

The provisions of [28 U.S.C. 2671-2680] and section 1346(b) of this title shall not apply to—

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [28 U.S.C. 2671-2680] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

* * * * *

STATEMENT

On February 6, 1982, Robert W. Carr, an enlisted Navy medical aide at Bethesda Naval Medical Center, fired several shots from a rifle into petitioners' automobile, injuring petitioner Mary Sheridan. Petitioners brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, alleging that the Navy had negligently failed to prevent the battery by Carr. Specifically, they alleged that Carr "had displayed instances of psychological instability in the past of such nature that the [Navy] knew or should have known that he posed a threat to the wellbeing and safety of others," but that the Navy "took no steps to quell this threat" (J.A. 4). They further alleged that Carr had kept the rifle in his quarters at the Medical Center in violation of Navy regulations and that the Navy "knew or should have known" this fact (*ibid.*).[1] They requested damages of $125,000 (J.A. 5).

In their memorandum in opposition to the government's motion to dismiss (J.A. 6-13, 14-18), petitioners recounted certain facts from the record of Carr's court-martial proceeding and elaborated on the allegations in their complaint (*id.* at 10-18). According to petitioners, on the night of the shooting Carr drank a large quantity of alcoholic beverages after finishing his shift and became inebriated, and between 8:45 and 9:00 p.m., three corpsmen found him on the floor of an old hospital building with a uniform bag. As the corpsmen attempted to take him to the emergency room, Carr broke free, grabbed his bag, and, reaching into it, revealed a rifle barrel. Petitioners

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[1] Petitioners have clarified that allegation by stating that Carr's roommate, a fellow enlisted man, knew that he had a rifle but failed to report it as required by Navy regulations (Br. 3, 25).

asserted that the three corpsmen then fled and did not report the incident. J.A. 10-11; Br. 4.[2] Very shortly thereafter, at approximately 9:00 p.m. petitioners alleged, Carr began shooting at passing vehicles on the public street in front of the hospital (J.A. 4) and hit a Metro bus as well as petitioners' automobile.

The government moved to dismiss on the ground that petitioners' claim is barred by the intentional tort exception to the FTCA, 28 U.S.C. 2680(h), which provides that the government is not liable for "[a]ny claim arising out of assault [or] battery." Petitioners opposed on the ground that their claim arose out of the government's negligent supervision of Carr. The district court dismissed the claim (Pet. App. 20a-29a). A divided court of appeals affirmed (*id.* at 1a-19a), holding that Section 2680(h) bars all "actions alleging negligence of the supervising employees when the underlying tort is an assault or battery by a government employee" (Pet. App. 5a).

SUMMARY OF ARGUMENT

The sweeping language of Section 2680(h) bars any claim "arising out of" various intentional torts. The plain language of the statute bars petitioners' claim because it arises out of Carr's battery. This Court made clear, in accordance with the language of the statute, that Section 2680(h) bars suit where a tort enumerated in the provision is essential to the plaintiff's claim. *Block* v. *Neal*, 460 U.S.

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[2] In fact, however, Carr's court-martial record shows that the corpsmen promptly notified a security officer. One of the three corpsmen, Nurse Florence Jackson, testified at the court-martial that she immediately notified Timothy Uram, who was on security watch, of the danger. Uram testified that he promptly responded to the warning.

289, 297 (1983). Carr's battery is essential to petitioners' claim since, without it, they would have suffered no injury.

The sweeping language of Section 2680(h) demonstrates that Congress intended to bar all claims where an intentional tort of a government employee caused the injury. As four members of this Court in *United States* v. *Shearer*, 473 U.S. 52 (1985), and the majority of the courts of appeals have concluded, that bar may not be circumvented by allegations that the government negligently supervised the employee who committed the intentional tort. The legislative history leading to the enactment of the FTCA in 1946 shows that Congress, proceeding cautiously, did not intend to waive the sovereign immunity of the United States for intentional torts committed by federal employees. The 1974 amendment to Section 2680(h), which authorized claims based on the intentional torts of law enforcement officers, shows that Congress has understood the provision to mean what it says. A contrary conclusion cannot be justified based on petitioners' contention that Congress meant to distinguish between negligent supervision and respondeat superior claims.

Nor can petitioners bring themselves within any exception to Section 2680(h) pertaining to special duties owed by the government to prevent particular torts. Unlike the cases holding that Section 2680(h) does not bar suit for negligently failing to prevent batteries by dangerous inmates, this case does not involve a mental patient or a prisoner or some other sort of dangerous inmate whom the Navy had assumed a duty to control. The only basis for finding the government liable here arises from the tortfeasor's status as a government employee, and Congress plainly intended not to waive sovereign immunity for torts committed by employees. The Seventh Circuit's

recent decision in *Doe* v. *United States*, No. 87-1436 (Jan. 21, 1988), that the government can be liable for failing to protect infants at a government day-care center, does not support petitioners' position, both because it is incorrect and because the Navy here never assumed any special duty to protect petitioners, and the finding that the government had assumed a special duty to protect the children at the day-care center was crucial to the decision in that case.

ARGUMENT

PETITIONERS' CLAIM IS BARRED BY THE INTENTIONAL TORT EXCEPTION BECAUSE IT ARISES OUT OF A BATTERY

A. The Plain Language of Section 2680(h) Bars Petitioners' Claim

The "sweeping" language of Section 2680(h) (*United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (plurality opinion))[3] plainly bars any claim "arising out of" a battery. As petitioners acknowledge (Br. 11 n.5), the word "arise" has a well-understood, ordinary meaning. It means "to spring up, originate, to come into being or notice" (*Black's Law Dictionary* 99 (5th ed. 1979)) or "to originate from a specified source" (*Webster's Third New International Dictionary* 117 (1976)). Congress's choice of the phrase "arising out of" indicates that it intended to establish a broad bar to claims originating in intentional torts. In *Kosak* v. *United States*, 465 U.S. 848, 854 (1984), which involved

[3] In *Shearer*, the Court unanimously held (473 U.S. at 57) that *Feres* v. *United States*, 340 U.S. 135 (1950), barred the claim that the Army had negligently failed to control a dangerous serviceman who kidnapped and murdered a fellow serviceman. Four of the eight Justices participating in the case also concluded that Section 2680(h) barred Shearer's claim. The four other Justices did not join that portion of the opinion addressing Section 2680(h), but did not separately address the issue (473 U.S. at 59-60).

the exception from the FTCA for "claim[s] arising in respect of * * * the detention of any goods or merchandise by any officer of customs" (28 U.S.C. 2680(c)), the Court equated the phrase "claim arising in respect of" with the phrase "claim arising out of" (465 U.S. at 854) and held that such "encompassing" terminology "sweep[s] within the exception all injuries associated in any way with the 'detention' of goods" (*ibid.*).

Petitioners' claim arose out of Carr's battery because, in the absence of the battery, they would not have been injured. Since injury is a necessary element of a tort claim (W. Prosser & W. Keeton, *The Law of Torts* 164-165 (5th ed. 1984)), in the absence of the battery they would have no claim. Here, as in *Shearer*, "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of [petitioners' injuries] and, consequently, the basis of [their] claim" (473 U.S. at 55 (plurality opinion)).[4]

This Court's decisions construing the misrepresentation exception—also part of Section 2680(h)—confirm that that provision bars claims when a tort enumerated in that provision is essential to the plaintiff's claim. In *United States* v. *Neustadt*, 366 U.S. 696 (1961), the Court held that Section 2680(h) barred a claim by purchasers of a house that they had paid too much as a result of their reliance on a faulty government appraisal. A subsequent

[4] Petitioners contend (Br. 10-11) that the language of Section 2680(h) is not particularly sweeping, and suggest that if Congress had intended Section 2680(h) to be read broadly it would have barred claims "involving" intentional torts. Petitioners are simply wrong in arguing that "arising out of" is not "sweeping" (*Shearer*, 473 U.S. at 55 (plurality opinion)) or "encompassing" (*Kosak*, 465 U.S. at 854). Moreover, if Congress had barred claims "involving" intentional torts, petitioners would undoubtedly argue that their claim does not involve an intentional tort but only involves negligent supervision.

case, *Block* v. *Neal*, 460 U.S. 289 (1983), involved a claim that the government was responsible for negligently supervising the construction of a house, and the government sought to dismiss the claim on the basis that the communication of the government's inspection report, which incorrectly stated that the house had been constructed properly, was a misrepresentation. The Court distinguished *Neustadt* on the basis that the plaintiffs there "alleged no injury that [they] would have suffered independently of" the misrepresentation since they were injured because they learned of and relied on the faulty appraisal (*id.* at 296). But in *Block* "the Government's misstatements [were] not essential to plaintiff's negligence claim" since she was injured by the negligent construction and would have been injured even if she had not learned of and relied on the faulty inspection report (*id.* at 297). Under *Block*, as the court concluded in *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir. 1986), cert. denied, No. 86-189 (Nov. 3, 1986), "a cause of action which is distinct from one of those excepted under § 2680(h) will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiff's claim." In this case, Carr's battery is essential to petitioners' claim because, without it, there would have been no injury.

The courts of appeals have, by and large, applied Section 2680(h) in accordance with its sweeping language. Since *Shearer*, five courts of appeals have rejected attempts to circumvent the provision where a battery was an essential element of the plaintiff's claim. *Thigpen* v. *United States*, 800 F.2d 393 (4th Cir. 1986) (minor dependents of retired military personnel were sexually assaulted by a medical corpsman while they were patients in a military hospital); *Miele* v. *United States*, 800 F.2d 50 (2d

Cir. 1986) (AWOL serviceman threw acid into the face of a four-year-old boy); *Hoot* v. *United States*, 790 F.2d 836 (10th Cir. 1986) (physical assault on a civilian woman by a soldier); *Johnson* v. *United States*, 788 F.2d 845 (2d Cir. 1986) (mailman sexually assaulted a young girl), cert. denied, No. 86-114 (Oct. 20, 1986); *Satterfield* v. *United States*, 788 F.2d 395 (6th Cir. 1986) (murder of one soldier by other soldiers); *Garcia* v. *United States*, 776 F.2d 116 (5th Cir. 1985) (sexual assault by an Army recruiter upon a potential recruit).[5] Those decisions are correct. As Section 2680(h) plainly states, Congress has not waived sovereign immunity with respect to claims arising out of batteries committed by government employees.

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[5] Prior to *Shearer*, the majority of the courts of appeals had held that Section 2680(h) barred claims where the injury was caused by a battery committed by a federal employee. *E.g.*, *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.) (multiple murders, rapes, and other batteries by servicemen), cert. denied, 449 U.S. 885 (1980); *Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (kidnapping, sexual assault, and shooting by a serviceman); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981) (sexual assaults on minors by a postman); *United States* v. *Shively*, 345 F.2d 294 (5th Cir.) (shooting by a serviceman who had been issued a military pistol in violation of regulations), cert. denied, 382 U.S. 883 (1965). Prior to this Court's decision in *Shearer*, the only court of appeals that had allowed suit where the injury was caused by a battery committed by a federal employee was the Third Circuit. Its decision in *Shearer* v. *United States*, 723 F.2d 1102 (1983), which was based on its prior decision in *Gibson* v. *United States*, 457 F.2d 1391 (1972) (Job Corps trainee, a government employee under 29 U.S.C. 1706(a)(3), stabbed instructor), was reversed by this Court under *Feres*. See 2 L. Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 260.02 (1987) (collecting cases).

B. Petitioners May Not Circumvent Section 2680(h) by Alleging That They Were Injured as a Result of the Negligent Supervision of the Employee Who Injured Them or That the Government Had a Special Duty to Protect Them

1. In conflict with the decisions of the other courts of appeals, the Ninth Circuit has held that Section 2680(h) may be circumvented by plaintiffs who allege that they were injured by the government's negligent supervision of the employee who committed the intentional tort. *Morrill* v. *United States*, 821 F.2d 1426 (9th Cir. 1987) (per curiam) (go-go dancer raped in serviceman's club); *Kearney* v. *United States*, 815 F.2d 535 (9th Cir. 1987) (woman murdered by a soldier after the Army allowed the murderer to violate his restriction to base); *Bennett* v. *United States*, 803 F.2d 1502 (9th Cir. 1986) (students at an Indian boarding school were sexually molested by a teacher).[6] As summarized in the per curiam opinion in *Morrill*, which followed the rule set forth in *Bennett* and *Kearney*, that court has concluded that "although section 2680(h) shields the government from respondeat superior liability for assault and batteries committed by employees, section 2680(h) does not shield the United States from the consequences of its own supervisory negligence" (821 F.2d at 1427). The Ninth Circuit acknowledged that its decisions conflicted with those of the other circuits (*Kearney*, 815 F.2d at 537-538).

Petitioners primarily contend, following the Ninth Circuit's approach, that "Congress' intent was to waive sovereign immunity for governmental negligence, while maintaining that immunity for intentional tort claims

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[6] The government's petitions for rehearing en banc were denied in *Bennett* and *Kearney* on December 21, 1987, and in *Morrill* on February 5, 1988.

based on *respondeat superior, simpliciter*" (Br. 9). Each of the three bases for government liability that they have asserted—that Carr was psychologically unstable and the Navy should have controlled him, that Carr kept a rifle in his quarters contrary to regulation, and that the three corpsmen who found Carr negligently allowed him to escape—are negligent supervision claims, as petitioners define the term.[7] None of the three claims are respondeat superior claims. Under respondeat superior, an employer is vicariously liable *for* its employee's tort, rather than being liable for negligently failing to prevent it, where the employee was acting within the scope of his employment when the tort was committed.[8] Carr plainly was not acting within the scope of his employment when he fired his rifle at their automobile, so the government would not be liable under respondeat superior.

There is no basis in the language of Section 2680(h) for the distinction petitioners and the Ninth Circuit urge. Rather, as the plurality concluded in *Shearer* in rejecting the claim that Section 2680(h) does not bar negligent supervision claims, "it is inescapable that the phrase 'arising out of assault [or] battery' is broad enough to encompass claims sounding in negligence" (473 U.S. at 56). The plurality went on to state: "[Plaintiff] cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or bat-

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[7] Petitioners state that a negligent supervision claim includes any claim that an intentional tort resulted from government negligence (Br. 7 n.4).

[8] " 'Scope of employment' is not confined to acts which may be thought of as component parts of the assigned work," but extends to reasonably foreseeable conduct that arises out of an employer's business, including intentional torts in some circumstances. 2 F. Harper & F. James, *The Law of Torts* 1381, 1391 (1956).

tery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like [plaintiff's] that sound in negligence but stem from a battery committed by a Government employee. Thus, 'the express words of the statute' bar [the] claim against the Government. *United States* v. *Spelar,* 338 U.S. 217, 219 (1949)." 473 U.S. at 55 (emphasis in original).[9]

Nor does the legislative history support the argument that Section 2680(h) bars respondeat superior claims only. Rather, the "sparse" legislative history shows that Congress passed the FTCA "on the straightforward assurance that the United States would not be financially responsible for the assaults and batteries of its employees" (*Shearer,* 473 U.S. at 55 (plurality opinion)).[10] Indeed, at the time the FTCA was enacted the notion that the government would be exposed to liability for the torts of its employees

[9] This Court similarly found the plain words of the statute controlling in *United States* v. *James,* No. 85-434 (July 2, 1986), and rejected an attempt to read into the statute an exception for negligence claims. *James* involved 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." The court of appeals held that Section 702c did not bar claims by recreational users of reservoirs who were injured when the government negligently failed to warn them before opening gates to release flood waters. This Court reversed, holding that the plain language of the statute barred all liability for damage from flood waters.

[10] The most extensive discussion of the intentional tort exception occurred in a colloquy between Assistant Attorney General Francis Shea and members of the House Judiciary Committee. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary,* 77th Cong., 2d Sess. 33-34 (1942). (The colloquy is reprinted, almost entirely, at Pet. Br. 13.) Mr. Shea confirmed that, under the intentional tort exception, the United States would not be liable where "some agent of the government gets in a fight with some fellow * * * [a]nd socks him."

was novel and controversial, as Congress's exceptionally long consideration of the Act (more than 15 years) shows. When the Act did pass in 1946, "[u]ppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.' " *Dalehite* v. *United States,* 346 U.S. 15, 28 (1953) (footnotes omitted). Beyond this core area, Congress's intention was to proceed cautiously. See Note, *The Federal Tort Claims Act,* 56 Yale L.J. 534, 547 & n.84 (1947). Alexander Holtzoff, an authoritative source on the meaning of the FTCA (see *Kosak,* 465 U.S. at 856), explained to Congress that the "theory" of the intentional tort exception "is that, since this bill is a radical innovation, perhaps we had better take it step by step." *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 76th Cong., 3d Sess. 22 (1940). Given that Congress was taking a cautious approach, it is not surprising that it intended to bar all claims arising out of the intentional torts of government employees, which are quite different than claims arising out of automobile accidents caused by employees acting within the scope of their employment.[11]

[11] While Congress did not explain exactly why it enacted Section 2680(h), it does not seem difficult to understand why Congress would have decided not to waive sovereign immunity in cases involving intentional torts. Intentional torts are sometimes found to be superseding causes relieving the negligent tortfeasor of liability (Restatement (Second) of Torts § 448 (1965)), and Congress might reasonably have concluded that in all cases the individual tortfeasor, plainly the more culpable party, ought to be required to defend his actions. Such a rule would likely be most effective in deterring intentional torts since injured persons would almost surely choose to sue the government

Petitioners note (Br. 17-19) that at the time Congress was considering and enacting the FTCA both negligent supervision and respondeat superior were recognized as bases for imposing liability on employers for claims arising out of the intentional torts of their employees. That is correct. 2 F. Harper & F. James, *The Law of Torts* 1390-1392 (1956). Contrary to petitioners, however, the obvious conclusion to draw from that fact is that if Congress, presumably aware of the two theories, intended to distinguish between the government's liability depending on the type of claim alleged, it surely would have so indicated in the language of the statute. That is especially so since almost any respondeat superior claim can be pleaded as a negligent supervision claim, so that the effect of a provision that insulated the government from liability only when respondeat superior was alleged would be somewhat limited. But the sweeping language of Section 2680(h) does not hint at a distinction between negligent supervision and respondeat superior. And, as the plurality in *Shearer* concluded, nothing in the legislative history suggests "that Congress distinguished between 'negligent supervision' claims and *respondeat superior* claims, with only the latter excluded under the Act" (473 U.S. at 55).[12]

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rather than the tortfeasor if suit against the government were not barred, and the cost to the government of seeking indemnity from the tortfeasor would likely be high. See also 28 U.S.C. 2676 (barring suit against government employees following judgment against the United States).

[12] There is no merit to petitioners' suggestion (Br. 13) that Assistant Attorney General Shea's comment that "[a]n injury caused by negligence could be considered under the bill" shows that Congress intended to permit negligent supervision claims. Mr. Shea's comment was made in response to Representative Cravens' concern that the intentional tort exception might bar claims for automobile accidents – the paradigmatic claim that Congress intended to permit – because in some jurisdictions a collision would be considered an assault. Mr. Shea simply assured Representative Cravens that a suit based on a negligent collision would not be barred by the exception. That assurance was accurate: "If a government postal driver unintentionally and negligently runs down a pedestrian, the Government may be held liable under the Act; but if he deliberately runs over the pedestrian, the claim is excluded by Section 2680(h)." 2 L. Jayson, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 260.02, at 13-50.3 to 13-50.4 (1987).

As the *Shearer* plurality also recognized (473 U.S. at 56), the 1974 amendment to Section 2680(h) confirms that the provision does not distinguish between negligent supervision and respondeat superior claims. The amendment waived sovereign immunity for six specified intentional torts, including "any claim arising * * * out of assault [or] battery" committed by "investigative or law enforcement officers of the United States Government." Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50.[13] "The premise of the legislation was that unamended § 2680(h) 'protect[ed] the Federal Government from liability when its agents commit[ted] intentional torts such as assault and battery.' " *Shearer*, 473 U.S. at 56 (plurality opinion) (quoting S. Rep. 93-588, 93d Cong., 1st Sess. 3 (1973)). There is no indication that Congress believed that the government's liability depended on whether the agents had been properly supervised. To the contrary, the amendment was prompted by " 'several incidents' of 'abusive illegal and unconstitutional "no-knock" raids' by federal narcotics agents [that Congress had reason to believe] were the result of inadequate supervision." *Shearer*, 473 U.S. at 56 n.2 (plurality opinion) (quoting S. Rep. 93-588, *supra*, at 2). Congress's understanding that its prior enactment

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[13] The amendment is not directly relevant here because Carr was not an "investigative or law enforcement officer."

precluded all claims for damages resulting from government employees' intentional torts, whatever the theory of liability, is entitled to great weight. See, *e.g.*, *Bell* v. *New Jersey*, 461 U.S. 773, 784-786 & n.12 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 & n.61 (1982) ("we must examine Congress' perception of the law that it was shaping or reshaping"). Moreover, petitioners' construction of Section 2680(h) would largely render the 1974 amendment surplusage because it is likely that the government would be liable for negligent supervision in most cases involving an intentional tort committed by a law enforcement officer. It is, at least, difficult to imagine any case arising out of an intentional tort committed by a law enforcement officer that could not be pleaded as a negligent supervision claim.[14]

2. Under *United States* v. *Muniz*, 374 U.S. 150 (1963), and *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), the government may be held liable, despite Section 2680(h), for negligent failure to prevent intentional torts by inmates of prisons and mental hospitals.[15] The dissenting judge below, recognizing that controlling Fourth Circuit precedent—*Thigpen* v. *United States*, 800 F.2d 393 (1986), and *Hughes* v. *United States*, 662 F.2d 219 (1981)—clearly barred claims alleging that a government employee was negligently supervised (Pet. App. 8a-11a), contended that those cases should be distinguished here because the government could be found liable if Carr were not a government employee. Petitioners alternatively urge that approach if their broader argument that the government may be liable for negligently supervising its employees is rejected.

[14] Petitioners argue (Br. 15) that "if Congress' 1974 use of the phrase 'arising out of assault [or] battery' effected a waiver of sovereign immunity for *respondeat superior* claims, then its use of the identical language in 1946 must have been similarly limited to *respondeat* claims." In our view, the 1974 amendment waived sovereign immunity for *both* negligent supervision and respondeat superior claims in cases involving batteries by law enforcement officers, and all such claims are barred by Section 2680(h) in cases involving other federal employees.

[15] The Court in *Muniz* mentioned Section 2680(h) only in passing, noting that "the Government is not liable for intentional torts of its employees" (374 U.S. at 163). The government did not argue in *Muniz* that Section 2680(h) barred the prisoner's claim that the government was liable for failing to prevent other prisoners from beating him.

There is no merit to that alternative approach here. Its basis is the contention that "had it been a private citizen who the three corpsmen found wandering drunk and brandishing a rifle, the government's liability would be unquestioned" (Pet. App. 12a; see also Pet. Br. 25). But nothing in *Muniz* or *Panella* supports such a conclusion. The duty breached by the government in those cases is the special duty of a custodian to control dangerous persons. See Restatement (Second) of Torts § 319 (1965).[16] Carr was not a mental patient or a prisoner and the Navy was not his custodian, so the Navy had no special duty to prevent him from committing intentional torts. There is no general duty to protect persons from the intentional torts of others. W. Prosser & W. Keeton, *The Law of Torts* 373-385 (5th ed. 1984). The Restatement explicitly provides that "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm" in

[16] Section 319 provides that "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." The reporter's notes make clear that the duty is placed on the custodian of institutions housing individuals such as persons suffering from contagious diseases and homicidal maniacs, not on employers whose employees happen to discover a drunk with a rifle.

the absence of a special relationship with the third person or his victim. Restatement (Second) of Torts § 315 (1965). A special relationship could be said to exist between the Navy and Carr only because it employed him.[17] While it is conceivable that a private employer would have had a duty to prevent Carr, as an employee, from intentionally harming others under the circumstances presented here (*id.* § 317),[18] such a claim would be based on Carr's status as an employee. As we have shown (pages 6-16, *supra*), Congress did not intend to make the government responsible for the intentional torts of its employees.[19]

The dissenting judge below suggested (Pet. App. 14a) that the "literalist interpretation" of Section 2680(h)

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[17] No special relationship exists between the Navy and petitioners either. See page 21, *infra*.

[18] Section 317 provides: "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control." While petitioners allege a violation of the duty to control Carr under these circumstances, it is by no means clear that they would be able to prove a violation if they were not barred by Section 2680(h) from bringing their claim.

[19] If Carr had been a mental patient at a government hospital, then, under cases following *Panella*, the government would be liable if it failed to exercise reasonable care to control him knowing that he was dangerous, even though he happened to be a federal employee. But the source of the duty to control in such a case would be his status as a mental patient, not his status as a federal employee. That is all that the government noted in our brief in *Shearer* (at 22 n.5); contrary to petitioners (J.A. 12; Br. 22-23), the government did not concede that the United States would properly be held liable in a case such as this.

adopted by the plurality in *Shearer* "is belied by the concession" that Section 2680(h) does not bar claims arising out of intentional torts committed by non-employees, and petitioners make a similar argument (Br. 13-14). It is indeed the case that nothing in the language of Section 2680(h) supports the interpretation, adopted explicitly in *Panella* and implicitly in *Muniz*, that the provision does not bar claims arising out of intentional torts committed by persons such as mental patients and prisoners. But that is not a reason to ignore the language of Section 2680(h) altogether. There is an important difference between the approach of the court in *Panella* and the approach petitioners urge. The court in *Panella* concluded from the FTCA's legislative history that Congress was focusing on torts committed by federal employees and read the phrase "committed by a federal employees" into Section 2680(h) on the theory that that is what Congress actually meant. Petitioners, in contrast, seek to change the meaning of the sweeping words Congress actually used in a way that is not consistent with Congress's intent since, in focusing on torts committed by federal employees, Congress plainly intended to bar all claims arising out of the intentional torts of those employees. Under petitioners' construction of Section 2680(h), "arising out of" is deprived of any meaning.

3. A divided panel of the Seventh Circuit recently held, in a case involving sexual molestation of children at an Air Force day-care center, that "where the government affirmatively assumes a duty to protect a person prior to and independent of any assault, and where an alleged breach of that duty leads to an assault on the person, whether or not by a government employee, the claim arises out of the government's negligence, and 28 U.S.C. § 2680(h) does not bar the cause of action." *Doe* v. *United States*, No. 87-1436 (Jan. 21, 1988), slip. op. 9-10 (petition

for rehearing pending).[20] That decision is based on Restatement (Second) of Torts § 315(b) (1965), which provides that a duty to control third parties arises where "a special relation exists between the actor and the other which gives to the other a right to protection." Petitioners attempt to bring themselves within the rule of Section 315(b) by alleging that "when the government promulgated regulations concerning weapon storage and safety, it voluntarily assumed a duty to protect them from injury" (Br. 21 (footnote omitted)).

As an initial matter, the Seventh Circuit erred in *Doe* v. *United States, supra*. Its decision is based on its conclusion that "the claim arises *solely* due to the government's alleged neglect of the children" (slip op. 7 (emphasis in original)). But that is plainly wrong. An intentional battery, the sexual molestation, is an essential element of the claim, since without the battery there would have been no injury. As we have shown (pages 6-8, *supra*), under this Court's decisions construing Section 2680(h) a claim is barred where a tort enumerated in Section 2680(h) is an essential element of the plaintiff's claim. Moreover, as the dissenting judge in *Doe* v. *United States* stated: "This distinction has no foundation in the statutory language. Section 2680(h) plainly and unambiguously bars claims 'arising out of assault [or] battery.' It does not exempt negligence claims arising from breaches of 'affirmative duties' imposed as a result of 'special relationships.' *See Thigpen*, 800 F.2d at 395-96." Slip op. 13.[21]

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[20] The Second Circuit recently dismissed without prejudice an interlocutory appeal in a case involving allegations of sexual molestation at a military day-care center. *Doe* v. *Scott*, No. 87-6061 (Mar. 24, 1988).

[21] The court in *Thigpen* concluded that Section 2680(h) barred a claim brought by girls who were sexually molested by an employee at a Navy hospital while they were patients there. The court explicitly rejected the position of a concurring judge "that § 2680(h) is inapplicable whenever the government can be found to owe plaintiff 'an affirmative duty,' " explaining that "the statutory derivation of [the concurring judge's] position remains obscure" (800 F.2d at 395).

In any event, the government assumed no special duty to protect petitioners. Unlike children in a government day-care center, they are just members of the general public. The regulation on which petitioners rely in asserting that the Navy voluntarily assumed a special duty to protect them appears to be aimed at protecting other servicemen, not members of the general public, since it does not prohibit servicemen from possessing firearms altogether but only prohibits them from keeping them on the base (Pet. App. 3a). But, whatever the purpose of the regulation, it plainly did not create a special duty on the part of the Navy to protect the general public. Indeed, it is contradictory to state that a special duty was assumed to protect particular persons and then assert that the persons protected include all members of the general public. Accordingly, the court below correctly concluded that petitioners' citation of the regulation adds nothing to their claim. Pet. App. 3a-4a; accord *Satterfield* v. *United States*, 788 F.2d 395, 398 (6th Cir. 1986).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
Attorney

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OCTOBER TERM, 1987

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MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

IRVING KATOR
JOSEPH B. SCOTT
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, Chtd.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners

* Counsel of Record

April 19, 1988

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

The government concedes, as it did in *United States* v. *Shearer*, 473 U.S. 52 (1985), and *Johnson* v. *United States*, 107 S.Ct. 315 (1986), that the intentional tort exception does not bar all claims against the government alleging negligent failure to prevent a federal employee from committing an intentional tort. This concession is fatal to the government's position. Acknowledging that liability exists in certain circumstances eviscerates the government's assertion that § 2680(h) bars all claims in which an intentional tort is an "essential element." Moreover, this concession lays bare the utter illogic of the government's statutory analysis, which trumpets strict adherence to the language while simultaneously cre-

ating unsupported self-serving exceptions. For these reasons, as more fully stated herein and in our opening brief, the government's argument must be rejected and the decision of the court below reversed.

1. The government principally relies on *Block* v. *Neal*, 460 U.S. 289 (1983), in arguing that a claim "arises out of" an intentional tort and is thus barred by § 2680(h) "when a tort enumerated in that provision is essential to the plaintiff's claim." Res. Br. at 7. This argument is belied, however, by the very authorities the government cites to support its statutory construction. Foremost, this argument is irreconcilable with *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), and *United States* v. *Muniz*, 374 U.S. 150 (1963): in both cases a "tort enumerated in [2680(h)]," *i.e.* an assault and battery, was "essential" to the plaintiff's claim. The government attempts to square *Panella* with its argument by "reading into" the statutory language (Res. Br. at 19) the proviso that the exception applies only when the intentional tort is committed by a federal employee. Only by relying upon this redrafting of the statute, however, can the government explain why § 2680(h) bars the Sheridans' claim but would not bar an identical claim where the assailant were other than a federal employee. Thus the government cannot conform its "essential element" argument to controlling precedent without eschewing its insistence on strict adherence to the statutory language.

Even indulging the government this one foray into legislative revision, its analysis still founders. The government concedes that § 2680(h) would not bar the Sheridans' claim had their assailant been a prisoner or mental patient who "happened to be a federal employee." The government explains that this is so because the "source of the [government's] duty to control," not the employment status of the assailant, determines its liability. Res. Br. at 18 n.19. While we agree that the source of the duty may play a significant role in determining the applicability of § 2680(h), this analysis betrays the invalidity of the government's "essential element" argument. The government does not explain why the intentional tort committed by a mental patient who "happens to be" a government employee is not an essential element of a claim while the intentional tort here is. Nor does the government explain why, of all the duties the government has, or may assume, § 2680(h) permits recovery only when the "source of the government's duty" is its role as a warden or an orderly. Certainly there is no textual support for this in either the statute or its legislative history. Neither is there support for this in traditional tort law, upon which the Act was built. Thus the government can only defend its position by first insisting upon strict adherence to the language of the statute, then engrafting a limiting proviso, and finally by rejecting strict adherence to its limiting proviso in favor of selective incorporation of traditional principles of tort law.

The government relies on the phraseology in *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir.), *cert. denied*, 107 S.Ct. 400 (1986), to elaborate on its "essential element" analysis: a claim will "be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to the plaintiff's claim." As noted above, the "essential element" argument is specious and particularly unhelpful in construing § 2680(h). But employing this articulation does not yield the result the government urges, for the government fails to account for the distinction between "governmental conduct" and conduct of an individual who happens to be a federal employee. *Cf.*, *Butz* v. *Economou*, 438 U.S. 478, 495 (1978) (rescinding immunity of government officials acting "manifestly beyond their line of duty"); *Otto* v. *Heckler*, 781 F.2d 754, 758, *amended* 802 F.2d 337 (9th Cir. 1986) (holding that no constitutional claim would lie where the intentional torts of a government employee

were not within the perimeters of his authority and hence not governmental conduct). The government concedes that the Sheridans' assailant was not acting within the scope of his employment when he fired upon them. Res. Br. at 11. Thus the "underlying *governmental* conduct" required by *Metz* was not present here. Accordingly, adoption of the "essential element" test articulated by the government would require reversal of the court below.

2. The government concedes that, notwithstanding its "essential element" test and the "sweeping" language of the statute,[1] a claim will lie against the government when there is a "special relationship" between the victim and the government; *i.e.*, where the "source of the duty" is other than the government's status as employer. Res. Br. at 18 n.19. Presumably by "reading into" the statute, the government attempts to limit this concession to cases involving mental patients and prisoners. There is, however, neither textual nor logical support for this limitation and, indeed, the government advances none. It is "hornbook law," for example, that one who voluntarily assumes a duty is obligated to carry out that duty with

[1] As we noted in our opening brief, nothing in the statute or the legislative history supports the gratuitous description of "arising out of" as "sweeping." Pet. Br. at 10-11. The only independent support the government proffers for this characterization is *Kosak* v. *United States*, 465 U.S. 848 (1984). Res. Br. at 6-7. *Kosak*, however, involves a different exception, § 2680(c), which was designed to shield an entire category of governmental activity from the threat of suit. H.R. Rep. No. 2245, 77th Cong., 3d Sess. 38 (1940). Had Congress sought to immunize the United States from liability for injuries resulting from intentional torts, it could have done so in much the same manner as it shielded the government from liability for "any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. *See United States* v. *James*, 106 S.Ct. 3116 (1986). Unlike either § 2680(c) or the statute discussed in *James*, § 2680(h) focuses on legal causes of action, not a generic physical injury or a specific government activity. Thus there is no inconsistency in reading § 2680(h) narrowly and these other provisions broadly.

due care. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). It strains credulity to suggest that Congress intended the courts to recognize only one obscure special relationship enumerated in a certain section of the Restatement of Torts, and to disregard all others established in common law.

We principally argued below that the source of the government's duty to the victim determined the applicability of § 2680(h); that the intentional tort exception barred claims in which the government's duty arose solely out of its status as the assailant's employer. The government endorses this approach, albeit grudgingly. This analysis reconciles the results in *Bennett* v. *United States*, 803 F.2d 1502 (9th Cir. 1986), where the government's duty arose out of statute and treaty, *Doe* v. *United States*, 838 F.2d 220 (7th Cir. 1988), where the government's duty arose out of its election to operate a day care center, and *Shearer*, where the government's duty, if any, could only have arisen out of its status as the assailant's employer. This analysis also mandates reversal of the court below, as the government's duty to the Sheridans arose out of its voluntary promulgation of regulations concerning the storage of firearms, and out of its failure to take adequate measures to control a drunk brandishing a firearm on the campus of Bethesda Naval.[2] Accordingly, applying

[2] As it did in *Shearer*, the government argues here that it did not owe any duty to the victims. This argument is made for the first time at this late stage of the litigation and is indeed inconsistent with the government's concessions in its briefs to the court of appeals and at oral argument that the Sheridans' claims would lie had their assailant been other than a federal employee. *See* Pet. App. 13a. If the Sheridans' claims would have been cognizable had their assailant been other than a federal employee, then obviously the government's duty arose independent of its status as the assailant's employer. In any event, the scope of § 2680(h) does not turn on whether there is a duty in this particular case: whether a duty exists in any particular case is a question initially for the district court.

the "source of the duty test," the decision of the court below must be reversed.

3. The government has offered an analysis which is riddled with exceptions, illogical, bootstrapped,[3] premised on selective parsing of the legislative history and dependent on "reading into" the statute key phrases and provisos. Indeed, the government has offered an analysis which apparently starts with the result it wishes to achieve and works its way back to the statute. Thus whatever surface plausibility the government's analysis may have, its application would work aberrant results, impute bizarre motives to Congress and create distinctions "so finespun and capricious as to be almost incapable of being held in the mind." *Indian Towing Co.*, 350 U.S. at 68. *See* Pet. Br. at 25-29.

In contrast, the two alternative analyses we proffer avoid these pitfalls. First, our contention that Congress intended § 2680(h) solely to bar *respondeat superior* claims of intentional torts is consistent with the statutory language and, placed in its historical perspective, is the more compelling reading of the legislative history. For example, the government's repeated reliance on congres-

[3] *See* Res. Br. at 15-17 and n.14. The government asserts that "in [its] view, the 1974 amendment waived sovereign immunity for *both* negligent supervision and respondeat superior claims in cases involving batteries by law enforcement officers." The government then describes its view as "Congress's understanding," which it concludes is entitled to great weight. Res. Br. at 15-16. However, there is simply no support in the legislative history for the government's "view," and no indication that this was Congress' "understanding." The only evidence the government cites in this respect is *Shearer*, which apparently relied on the government's brief for its conclusion that the issue of negligent supervision was presented to Congress during its consideration of the 1974 amendment. As we discussed in our opening brief, Pet. Br. at 14-15, the legislative history and the cases Congress examined describe *respondeat superior* claims. The supervision of the federal agents—whether negligent or otherwise—was not discussed.

sional intent to "proceed cautiously" and to "take it step by step," Res. Br. at 13, suggests that Congress intended only to waive sovereign immunity for government automobile accidents. Thus, by the government's reading of the legislative history, claims involving aircraft or pharmaceuticals would have to await amendment of the statute. As we noted in our opening brief, however, contemporary legal debate focused on whether, as a matter of social policy, it was appropriate to extend the theory of *respondeat superior* liability into the arena of intentional torts. Pet. Br. at 18-19. This extension, we submit, is what Congress was hesitant to endorse and what counseled Congress to proceed cautiously, step by step.

Alternatively, we submit that the intentional tort exception bars only those claims in which the government's duty to the victim arose solely out of its status as the assailant's employer. Thus, the government would be amenable to suit in those cases in which it had assumed a duty to protect the victim (*e.g.*, promulgation of regulations concerning firearms; operation of a day care center), or in those cases where the employment status of the assailant was immaterial to the government's duty and breach thereof (*i.e.*, the fact that the assailant was a federal employee was not necessary for the injury to occur).

Unlike the government's analysis, both of ours are anchored in traditional elements of tort law and avoid creating untenable distinctions and irrational results. Our first argument is the simplest: no claim will lie against the government attempting to impute *respondeat superior* liability for the intentional torts of federal agents. The separate tort of negligently allowing this intentional tort to occur, where it can be proved, will provide liability against the government, since it is undisputed that Congress intended to waive immunity for injuries caused by the government's negligence. Our second argument, that the source of the government's duty

determines the applicability of the intentional tort exception, similarly focuses on traditional components of tort law and similarly avoids creating artificial and illogical distinctions. As it cannot be said that the analysis put forward by the government is unambiguously mandated, and as the government's analysis forces the Court to impute to Congress the intention to "create untenable distinctions and unreasonable results," *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982), the government's arguments must be rejected and the decision below reversed.

CONCLUSION

For the foregoing reasons, and for those reasons stated in our opening brief, the decision of the Court of Appeal for the Fourth Circuit must be reversed.

Respectfully submitted,

IRVING KATOR
JOSEPH B. SCOTT
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, Chtd.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners

* Counsel of Record

April 19, 1988

Supreme Court, U.S.
FILED
MAR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

IRVING KATOR
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners

* Counsel of Record

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the
Solicitor General

ANTHONY J. STEINMEYER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 16, 1987
CERTIORARI GRANTED JANUARY 19, 1988

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RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
1985		
Feb. 21	1	Complaint
" "	—	Magistrates Notice, LR10A to attorney for plaintiff.
" "	2	Summons issued. (cc, Magistrates Notice to attorney for plaintiff for service on U.S. Government, 60-day summons)
Apr. 22	3	ANSWER.
" "	4	Motion of Defendant to Dismiss and Memorandum. (c/s)
" 30	5	Scheduling Order (Murray, J.) and Attachment. (C/M by Chambers 4/30/85) (EOD 5/1/85 feh)
May 6	6	Opposition of Plaintiffs to Motion of Defendant to Dismiss and Proposed Order. (c/s)
" 20	7	Response of Defendant to Opposition of Plaintiffs to its Motion to Dismiss. (c/s)
Oct. 25	8	Motion of Defendant to postpone pretrial conference and to Compel Discovery. (c/s)
" 30	9	Order (Murray, J.) "Amending" Scheduling Order, as therein more particularly set forth. (C/M 10/30/85 Clk) (EOD 10/30/85 Clk)
Nov. 5	10	Supplemental memorandum of Plaintiff in opposition to Motion of Defendant to Dismiss and attachment. (c/s)
" 18	11	Response of Defendant to Supplemental Memorandum of Plaintiff in Opposition to Motion of Defendant to Dismiss. (c/s)
Dec. 10	12	Memorandum and Order (Murray, J.) (C/M 12/10/85 Clk) (EOD 12/11/85 Clk)

DATE	No.	PROCEEDINGS
1985		
" "	13	Judgment (Clerk) "GRANTING" Motion of Defendant to Dismiss. (C/M 12/10/85 Clk) (EOD 12/11/85 Clk) Closed file
1986		
Jan. 28	14	Notice of Appeal of Plaintiffs. (Filing fee paid) (c/m 2/27/86)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CA No. ———

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN
14000 Burning Bush Lane
Silver Spring, Maryland 20906
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

COMPLAINT

[Federal Tort Claims Act]

Plaintiffs Michael N. Sheridan and Mary A. Sheridan, through counsel, hereby sue the United States for personal injury and property damage caused by the defendant's negligence.

Jurisdiction

1. This Court has jurisdiction over this action under 28 U.S.C. §§ 2671-80, the Federal Tort Claims Act, and 28 U.S.C. § 1346(b).

Venue

2. Venue is proper in this District under 28 U.S.C. § 1402(b) as the plaintiffs reside herein and the acts and omissions complained of occurred in this District.

Parties

3. Plaintiff Michael N. Sheridan is a citizen of the United States and a resident of the State of Maryland.

He is the owner of the vehicle damaged by the defendant's negligence.

4. Plaintiff Mary A. Sheridan is a citizen of the United States and a resident of the State of Maryland. She sustained personal injury, loss of income, property damage and pain, suffering and mental anguish as a result of defendant's negligence.

5. Defendant is the United States of America. The agency responsible is the United States Navy.

Factual Basis Of The Complaint

6. At approximately 9:00 p.m. on February 6, 1982, a United States Navy medical aide at the Naval Medical Center in Bethesda, Maryland fired several shots from a rifle he had stored in his quarters. At least five of the shots struck the vehicle in which plaintiffs were driving, and plaintiff Mary A. Sheridan was struck by the fragments of at least one of these bullets.

7. The medical aide's possession of firearms on the campus of the Naval Medical Center as well as his storage of these firearms in his quarters was in violation of the United States Navy's and the Naval Medical Center's rules and regulations. These rules and regulations were adopted to protect individuals such as plaintiffs from harm caused by the use of such firearms. The medical aide violated these rules and regulations while acting within the scope of his employment.

8. The medical aide had displayed instances of psychological instability in the past of such nature that the defendant knew or should have known that he posed a threat to the wellbeing and safety of others. The defendant took no steps to quell this threat.

9. The defendant knew or should have known that the medical aide was storing firearms in his quarters in violation of applicable rules and regulations and to the po-

tential detriment of individuals such as plaintiffs. The defendant took no steps to confiscate these firearms.

10. As a result of the defendant's acts and omissions, plaintiffs suffered property damage, personal injury, loss of income and pain, suffering and mental anguish.

Legal Basis Of The Complaint

11. If a private person, the defendant would be liable for negligently inflicting these damages on plaintiff under the law of the State of Maryland.

Exhaustion Of Administrative Remedies

12. Plaintiff individually timely presented their claims to the United States Navy, and the Navy, by decisions dated August 22, 1984, rejected both claims. Because of the discovery of new evidence and because of intervening facts relating to the amount of the recovery, plaintiffs here seek an additional recovery than sought below.

WHEREFORE, in consideration of the foregoing, plaintiffs seek an award against the United States in the amount of $125,000.

/s/ Michael J. Kator
MICHAEL J. KATOR
10220 River Road
Suite 204
Potomac, Maryland 20854
(301) 469-5888

/s/ Irving Kator
IRVING KATOR
KATOR, SCOTT & HELLER
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Attorneys For Plaintiffs

Date: 2/21/85

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HM-85-775

MICHAEL N. SHERIDAN, *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs submit this supplemental memorandum to address the Supreme Court's recent decision in *United States* v. *Shearer*, 105 S.Ct. 3039 (1985) and to address additional facts learned through discovery. For the reasons stated herein, as well as those reasons set forth in our original opposition to defendant's motion to dismiss, defendant's motion must be denied.

1. *The Shearer Decision*

The *Shearer* case dealt with a complaint under the Federal Tort Claims Act ("FTCA") filed by the administratrix of the estate of a serviceman who had been kidnapped and murdered by another serviceman. The plaintiff alleged that the Army was negligent in failing to exercise sufficient control over the murderer and in failing to warn others that he was at large in light of his previous conviction and incarceration for manslaughter. The Third Circuit held that plaintiff's suit was not barred by the intentional tort exception of 28 U.S.C. § 2680(h), concluding that "if an assault and

battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA." *Shearer* v. *United States*, 723 F.2d 1102, 1107 (3d Cir. 1983).

Because the victim in *Shearer* was a member of the armed services, and because the suit in essence challenged management decisions relating to the supervision and control of servicemen, the Supreme Court reversed, holding that the *Feres* doctrine (*Feres* v. *United States*, 340 U.S. 135 (1950)) barred recovery. On the issue of the intentional tort exception of the FTCA, however, the Court split four to four. Chief Justice Burger, along with Justices Rehnquist, O'Connor and White, concluded, as the government argues here, that "the phrase 'arising out of assault [or] battery' is broad enough to encompass claims sounding in negligence." 105 S.Ct. at 3043. Justices Brennan, Blackmun, Stevens and Marshall concurred only as to the *Feres* aspect of the case, however, specifically declining to join in the intentional tort aspect of the decision. *See* 105 S.Ct. at 3044. Justice Powell took no part in the decision of the case. Accordingly, although the Supreme Court reversed *Shearer*, it did so on grounds not applicable here and thus the breadth of the intentional tort exception has not been definitively resolved.

Even though the Supreme Court did not resolve the issue in *Shearer*, the differences between this case and *Shearer* are such that even under the broad reading of § 2680(h) recovery would be allowable here. In *Shearer*, the complaint was that the Army failed adequately to discipline and supervise an enlisted man with a known propensity for violence. Here, while plaintiffs have alleged that defendant was negligent in failing to restrain someone with Mr. Carr's known instability, they also have alleged that defendant was negligent in allowing, contrary to its own regulations, the storage of weapons

and ammunition on the campus of the Navy Medical Center.[1] Under Maryland law, violation of a statute designed to protect person or property constitutes negligence *per se* where such violation was a proximate cause of the injury. *J. Aron & Co., Inc.* v. *Service Transportation Co.*, 486 F. Supp. 1070, 1075-76 (D. Md. 1980). Since Mr. Carr's possession of the firearms was the *sine qua non* of plaintiffs' injuries, his possession of the weapon and defendant's tolerance of the storage of the firearms in violation of its regulations after it knew that he possessed such weapons constitute negligence *per se*.

Even under Chief Justice Burger's broad reading of the intentional tort exception in *Shearer*, the government would be liable when it is negligent *per se* and a reasonable and probable consequence of its negligence is that an intentional tort will be committed. Chief Justice Burger predicated his conclusion regarding the breadth of the intentional tort exception on the intent of Congress. Yet he also cited with approval, and thus consonant with Congress' intent, that line of cases holding that the government will be liable for the intentional torts of non-government employees precipitated by the government's negligence, as well as the intentional torts of federal employees whose status as employees is coincidental and unrelated to the commission of the intentional tort.[2] Chief Justice Burger thus concluded that

[1] In answers to interrogatories and in response to document requests, defendant has conceded that United States Navy and Navy Medical Center regulations prohibit the storage of weapons on base, that all military personnel are responsible for reporting violations of this and other regulations to the appropriate authorities, and that before the shooting incident weapons and ammunition were observed in Mr. Carr's quarters.

[2] In *Fair* v. *United States*, 234 F.2d 288 (5th Cir. 1956), for example, the individual who was able to commit the intentional tort happened to be a government employee, but his status as an employee was wholly unrelated to the commission of the tort. Specifically, the tortfeasor was an Air Force Captain who had been

Congress intended to waive the sovereign immunity of the United States in cases where intentional torts are committed as a result of the government's negligence and the tortfeasor's status as an employee is immaterial to the commission of the tort.

In this case, had it been a patient rather than a federal employee who battered plaintiffs with Mr. Carr's unlawfully possessed weapon, the government's liability would go unquestioned. Yet the fact that it was Mr. Carr, and not someone else, who catalyzed the government's negligence into injury is inconsequential. The purpose of defendant's regulation prohibiting the storage of weapons is to protect person and property;[3] since a reasonable and probable consequence of violation of this regulation is that someone will be injured—either accidentally or intentionally, and either by a federal employee or a non-federal employee—how and by whom the injury is inflicted is immaterial. By its *per se* negligence the government subjected plaintiffs to risk, and here, unlike the situation in *Shearer*, the perpetration of the tort is unrelated to the status of the perpetrator as a federal employee. The government cannot escape liability for its *per se* negligence by the happenstance that the person who actuated its negligence was a federal employee.[4]

released from a federal hospital. The court's reasoning did not turn on his status as a federal employee: had he been the spouse of an Air Force officer, for example, the same result would have ensued.

[3] As the Fifth Circuit observed in construing a similar regulation, "the precautionary measures were intended to minimize accidents and to prevent injury to persons: they were for the benefit of the public, including [the victim.]" *Underwood* v. *United States*, 356 F.2d 92, 98-99 (5th Cir. 1966).

[4] In every case applying the intentional tort exception, as well as in *Shearer*, the probable consequence of the government's alleged negligence was that a *federal employee* would injure someone. *See, e.g., Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983) (failure

2. *Facts Revealed In Discovery*

Through the discovery process, plaintiffs have uncovered additional facts which demonstrate the government's negligence and which are pertinent to defendant's motion to dismiss. Specifically, through examination of the records of the court martial of Mr. Carr, plaintiffs have discovered facts concerning the events leading up to plaintiffs' injuries, which are germane to the issues presented in defendant's motion.[5]

After Mr. Carr had finished his shift on February 6, 1982, he began drinking. Before, during, and after having dinner, Mr. Carr drank a liter or two of wine, a half pint of rum and at least four mixed drinks. At some point in the evening, Mr. Carr packed some possessions, including a rifle and ammunition, into a uniform bag and left his quarters. Between 8:45 and 9:00 p.m., three naval personnel observed Mr. Carr lying face down on the concrete floor in the old hospital building. Because these three corpsmen recognized that Mr. Carr was unconscious, or barely conscious, they proceeded to

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to prevent off-duty serviceman from committing battery); *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980) (same); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981) (failure to prevent mail carrier from committing battery). In contrast, in those cases (cited with approval in *Shearer*) in which the intentional tort exception *was not* applied, the probable consequence of the government's negligence was that someone, perhaps a federal employee and perhaps not, would injure someone else. *See e.g., Hicks* v. *United States*, 511 F.2d 407 (D.C. Cir. 1975) (patient released from federal hospital committed battery); *Rogers* v. *United States*, 397 F.2d 12 (4th Cir. 1968) (individual assaulted by former federal employee).

[5] Attached hereto is the testimony of Hospitalman Christopher D. Hunter given at Mr. Carr's court-martial. Other portions of the court-martial record, including the testimony of other corpsmen and argument of counsel, corroborate Mr. Hunter's testimony. For purposes of this opposition, therefore, plaintiffs' submit only his one excerpt.

escort him to the hospital emergency room. Two of the corpsmen supported Mr. Carr and another took the bag containing the rifle and ammunition. Mr. Carr was unable to support himself and the corpsmen had a difficult time transporting him to the emergency room. Several times along the way Mr. Carr slipped from their grasp and fell to the floor, and, apparently on more than one occasion, Mr. Carr fell head-first down a flight of concrete stairs.

During the journey to the emergency room, Mr. Carr questioned the corpsmen about the whereabouts of his bag. He was told that one of the corpsmen was carrying it. Ultimately, the three corpsmen and Mr. Carr arrived at a set of double doors which separated the building they were in from the emergency room. To their surprise, these doors were locked. Thus, the corpsmen began to bring Mr. Carr around to the other side of the building. At this point, Mr. Carr, still intoxicated to the point of semiconsciousness and reeling from having fallen down several flights of concrete steps, broke free from the two corpsmen holding him and grabbed his bag back from the third corpsman. Mr. Carr reached into his bag and revealed the barrel of a rifle. The three corpsmen, surprised and shocked but not scared, fled.[6] Later that evening, Mr. Carr fired several shots at plaintiff.

Plaintiffs' complaint alleges that defendant was negligent in failing to restrain and control a medical aide who it knew was unstable. While this allegation is similar in nature to that in *Shearer*, in light of the foregoing facts it takes on an entirely new dimension. Whereas in *Shearer* the government's negligence could

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[6] Not only were these three corpsmen negligent in allowing Mr. Carr to escape, particularly given that they observed the rifle barrel and were aware of his impaired condition, but further they were negligent in failing to report this incident to the appropriate authorities so that Mr. Carr could be apprehended before he harmed himself or others.

only have resulted in a federal employee committing an intentional tort, the government's negligence in this case is unrelated to Mr. Carr's status as a federal employee. That is, had it been a non-federal employee rather than Mr. Carr who the three on-duty corpsmen found in a drunken stupor and yet failed to restrain, the government's liability would be unquestioned. The government cannot be absolved of liability because of the fortuity that the individual who it negligently failed to restrain was a federal employee.

In arguing that the *Panella* line of cases (*Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954)) was not inconsistent with the result it urged, the government conceded in its brief to the Supreme Court in *Shearer* that

> [i]n some of the cases, the tortfeasor was, for example, a dangerous mental patient who also happened to be a federal employee; but the source of the government's duty to supervise him was his status as a patient, not his status as an employee.

Brief for the United States at 22 n. 5 (excerpt attached). Here, the government's duty to supervise Mr. Carr arose not from his status as an employee, but instead from his presence in the old hospital building in an unconscious state, and, more particularly, from his possession of a firearm while on hospital grounds and in an impaired state. In light of these facts, and the Solicitor General's concession in *Shearer*, the intentional tort exception of § 2680(h) cannot bar plaintiffs' claims here.

3. *Conclusion*

For the foregoing reasons, and for those reasons stated in our original opposition to defendant's motion to dismiss, plaintiffs submit that defendant's motion is without merit. Accordingly, plaintiffs request that defendant's motion be denied and this case proceed to trial.

Respectfully submitted,

KATOR, SCOTT & HELLER

/s/ Irving Kator
IRVING KATOR
1029 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 393-3800

/s/ Michael J. Kator
MICHAEL J. KATOR
10220 River Road
Suite 204
Potomac, Maryland 20854
(301) 469-5888
Attorneys For Plaintiffs

Date: Nov. 1, 1985

ORIGINAL

VERBATIM

RECORD OF TRIAL

(and accompanying papers)

of

CARR, ROBERT W. 214-82-9923 HN

U.S. Navy

National Naval Medical Center, Bethesda, Md.

By

GENERAL COURT-MARTIAL

Convened by Commanding Officer

National Naval Medical Center, Bethesda, Md.

Tried at

NAVLEGSVCOFF WASH DC on

24 April, 20, 21 & 24 May 19....

Volume I of II

[Preliminary questions by TC:]

Q. For the record would you please state your name, your rate and your current duty station?

A. Yes. My name is HN Christopher Dwight Hunter, NNMC.

MJ: Please speak up because the court members are unable to hear you, Hunter. Speak into the microphone.

WIT: HN Christopher Dwight Hunter, NNMC, Bethesda, Maryland.

Q. And do you know the Accused in this case?

A. Yes, I do. I recognize him.

Q. So you see him present in court today?

A. Yes, sir.

Q. And what is his name?

A. Robert CARR.

TC: Let the record reflect the witness has correctly identified the Accused. Your witness, counsel.

DIRECT EXAMINATION

[Questions by DC:]

Q. Hospitalman Hunter, are you on active duty in the U.S. Navy?

A. Yes, sir.

Q. Hospitalman Hunter, you've indicated that you could recognize Hospitalman CARR. Is he the same individual you saw on 6 February 1982?

A. Yes, sir.

Q. Could you explain, please, to the court when you first noticed Hospitalman CARR on 6 February?

A. It was on the first deck of the old hospital near our disbursing office.

Q. Do you have an idea what time it was?

A. It was between . . . I'll say between 2045 and 2100.

Q. And how did he appear to you when you saw him at that time?

A. He was just laid out on the deck.

Q. And were you with other people at the time?
A. Yes, sir.
Q. Who were they?
A. HN Jackson and HN Hoffman.
Q. When you came across Hospitalman CARR and he was laid

• • • •

Q. A blue garment bag?
A. Yes, sir.
Q. What happened to that blue garment bag; did someone take it from him?
A. Yes, sir, HN Hoffman was carrying the bag.
Q. And what did you attempt to do for Hospitalman CARR?
A. Me and HN Jackson just attempted to try to take him over to the ER.
Q. Did anything stop you from going into the ER?
A. Yes, sir.
Q. What was that?
A. The doors were locked.
Q. These are doors to the hallway?
A. Yes, sir, to that hallway that leads over to the ER.
Q. To your knowledge had they been locked before?
A. Not that I can really remember.
Q. Were you surprised at all to find them locked?
A. Yes, I was.
Q. What did you do in response to finding these doors locked?
A. Well, I was upset just a little bit but then we just tried to take him around the other way.
Q. You say this blue garment bag was held by the other hospitalman?
A. Yes, sir.
Q. And what happened to it ultimately?
A. He got it back.
Q. Hospitalman CARR?
A. Hospitalman CARR.

Q. Had he inquired about this blue garment bag that someone else was carrying?
A. Yes. Once we got downstairs and we couldn't get him through the doors that led to the ER.
Q. And how is it that he got it back from you from the other hospitalman?
A. Well, we didn't have too tight of a security grip on him, so he just broke himself away and got the bag back.
Q. To your knowledge was anything taken out of the bag?
A. I was told at a later time that it was a rifle that he had acquired. We seen him reach into the bag and all I seen was just a barrel.
Q. And what did you do next?
A. We just got out of Dodge.
DC: Thank you, Your Honor, I have no other questions.

CROSS EXAMINATION

[Questions by TC:]

Q. Hospitalman Hunter, when you saw the barrel come out of the bag, what were your feelings at that time?
A. I was surprised.
Q. Anything else?
A. Shocked, but I was not scared.
Q. What did you do?
A. The other two hospitalman did run. I moved the wrong way. I ran towards the exit where it was locked, but I just stood behind the wall.
Q. And you didn't see him again that night, did you?
A. No, no more.
Q. But you did run when you saw that barrel come out of the bag?
A. I did run.
TC: No further questions.
DC: I have no other questions, Your Honor.

MJ: Questions by the court?

[Negative responses from all court members.]

MJ: Hospitalman Hunter, you're excused.
WIT: Thank you, sir.

[The witness withdrew from the courtroom.]

DC: Your Honor, at this time we'd like to call to the stand Hospitalman Apprentice Timothy Uram.
MJ: Proceed.

WHEREUPON,

HA TIMOTHY J. URAM, USN

was called as a witness by the defense, was duly sworn, and testified as follows:

[Preliminary questions by TC:]

Q. For the record, would you please state your name, your rate and your current duty station?

A. My names Timothy James Uram; I'm an HN; and I'm assigned to National Naval Medical Center.

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No. 87-626

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN,
Petitioners,
v.
THE UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

IRVING KATOR
JOSEPH B. SCOTT
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, Chtd.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners
* Counsel of Record

March 4, 1988

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QUESTION PRESENTED

Whether the intentional tort exception of the Federal Tort Claims Act bars all suits against the United States alleging negligent failure to prevent a federal employee from committing an intentional tort, including cases in which the injury results from the government's breach of an affirmative duty to protect the public and those where the source of the government's duty to prevent the injury arises independent of its status as the assailant's employer.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (Pet. App. B at 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. *See* Pet. App. A at 1a. The petition for a writ of certiorari was filed October 16, 1987 and granted by this Court on January 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 1346(b) provides, in pertinent part:

> Subject to the provisions of [28 U.S.C. §§ 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) shall not apply to—
>
> • • • •
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

STATEMENT

This case arises out of Dr. and Mrs. Sheridan's attempt to recover for the injuries they sustained when, because of the government's negligence, they were fired upon by a Navy enlisted man outside the Naval Medical Center in Bethesda, Maryland. The undisputed facts[1] are as follows:

In February, 1982, Robert W. Carr was a Medical Aide enlisted in the United States Navy and stationed at the Navy Medical Center in Bethesda, Maryland (commonly known as "Bethesda Naval"). He resided in base quarters where he shared a room with another enlisted man. In defiance of Navy regulations which prohibited the possession and storage of firearms in base housing, Mr. Carr maintained a .22 caliber rifle and ammunition in his quarters. Navy regulations not only proscribed such conduct, but as well placed an affirmative obligation on any individual who knew of a violation of such regulations to bring this matter to the attention of the appropriate authorities. Mr. Carr's roommate, also a Navy enlisted man, was aware of Mr. Carr's possession of this contraband, but he remained silent about the weapon and ammunition until the Navy made its investigation into the shooting.

After his assigned shift on February 6, 1982, Mr. Carr began drinking and ultimately became inebriated. At some point in the evening, Mr. Carr packed some of his possessions, including the rifle and ammunition, into a bag and left his quarters. Between 8:45 and 9:00 that

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[1] This case arises on appeal of the granting of the government's motion to dismiss; therefore all facts as pleaded by the Sheridans must be accepted as true. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). In addition to the allegations in the complaint, the Sheridans relied on facts learned in discovery in opposing the government's motion to dismiss their complaint. *See* J.A. 10-12. The district court, and the court of appeals, accepted these additional allegations as true for purposes of their decisions.

evening, three Navy personnel found Mr. Carr lying face down on the concrete floor in a part of the campus known as the "old hospital building." Recognizing that Mr. Carr was inebriated to the point of unconsciousness, they began to escort him to the base emergency room.

Two of the corpsmen carried Mr. Carr while the third carried the bag containing the rifle and ammunition. Mr. Carr was unable to support himself and the corpsmen had a difficult time transporting him to the emergency room. Several times along the way Mr. Carr slipped from their grasp and fell to the floor and, at least on one occasion, Mr. Carr fell head first down a flight of concrete stairs.

Notwithstanding his debilitated condition, Mr. Carr broke free from the two corpsmen supporting him and snatched his bag back from the third. When he grabbed his bag, he revealed the barrel of his rifle. Yet when this happened, none of the corpsmen attempted to restrain or subdue Mr. Carr, forcibly or otherwise. Nor did they attempt to alert base security. Rather they simply fled, apparently without another thought, leaving Mr. Carr to his own devices.[2]

Mr. Carr made his way out of the hospital building and ended up near the public road that fronts the campus of Bethesda Naval. At that point, Mr. Carr began shooting at passing vehicles, including a public transit bus and the vehicle driven by the Sheridans. Mrs. Sheridan was struck both by the bullets and shards of the shattered windshield and she sustained injuries to her face and hands. Dr. Sheridan was not physically injured, but he was traumatized by both the shooting itself and by witnessing his wife's injuries.

After exhausting their administrative remedies, the Sheridans brought suit in the United States District Court

[2] In its brief in response to the Sheridans' petition, the government contends that one of the corpsmen did notify base security about Mr. Carr. *See* Brief for the United States at 2 n.2. Resolution of this factual dispute, of course, is for the district court.

for the District of Maryland. In that court, the government moved to dismiss on the basis of the "intentional tort" exception, 28 U.S.C. § 2680(h). The district court, while "sympathetic" to the Sheridans' plight, Pet. App. B at 26a, granted the government's motion. Over Chief Judge Winter's dissent, the Fourth Circuit affirmed. This petition timely followed.

SUMMARY OF ARGUMENT

Dr. and Mrs. Sheridan filed suit against the United States pursuant to the Federal Tort Claims Act (hereafter "FTCA" or "the Act") to obtain compensation for the injuries they sustained as a result of the government's negligence. Relying on *United States* v. *Shearer*, 473 U.S. 52 (1985), both the district court and the court of appeals below held that their claims were barred by the intentional tort exception to the Act, 28 U.S.C. § 2680(h), as they "ar[ose] out of assault [and] battery." The courts below, and many of the lower courts that have recently addressed the intentional tort exception, have reduced *Shearer*[3] to the simplistic rule that a case "arises out of assault and battery" whenever the government's negligence allows a federal employee to commit an intentional tort. This case shows that the rigid interpretation adopted in *Shearer* incorrectly gauges Congress' intent and thus imprudently absolves the government of responsibility for its negligence. Accordingly, the decision below must be reversed and the Sheridans allowed to press their claims for recovery for the injuries they sustained as a result of the government's negligence.

1. There is no dispute here that the government was negligent, and that the government's negligence was a proximate cause of the Sheridans' injury. Nor is there any dispute that the Sheridans were assaulted and battered by a federal employee; indeed this was one of the

[3] We use "*Shearer*" generally to refer to Part IIA of Chief Justice Burger's opinion on which the Court was evenly divided.

foreseeable consequences of the government's negligence. There are several reasons, however, why the Sheridans' claims do not "aris[e] out of assault [or] battery" and why, therefore, the courts below erroneously dismissed their claims.

First, the Sheridans were injured because the government breached a duty it had imposed upon itself to protect members of the public, including the Sheridans. Both the Department of the Navy and the Navy Medical Center had adopted regulations prohibiting the storage of weapons on base and requiring known violations of these regulations to be reported to appropriate authorities. *See* J.A. 8 at n.1. While the FTCA certainly did not impose upon the government the obligation to adopt these regulations, once the government assumed this duty it was obligated to carry it out with due care. Every court that has considered this precise question, with the exception of the court below, has held the intentional tort exception inapplicable, and thus required the government to answer for breaching its affirmative obligation to prevent the commission of an intentional tort. The Fourth Circuit's treatment of this issue is illogical and irreconcilable with Congress' remedial purpose in enacting the FTCA. At a minimum, § 2680(h) must allow actions that seek to hold the government to its self-imposed duty to protect specific members of the public.

2. No court has questioned the amenability of the government to suit when it negligently allows a nonfederal employee to commit an intentional tort. Justice Harlan's analysis in *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), has been universally accepted; indeed even *Shearer* cited the *Panella* line of authority with approval.

The government conceded below, and the court of appeals held, that the Sheridans' claims would lie had their assailant been other than a federal employee. Yet the government's duty to protect the Sheridans from injury

arose wholly independent of Mr. Carr's employment status. Had it been a patient rather than a corpsman who removed and later fired the illegally stored weapon, or had it been a private citizen rather than a federal employee whom the three corpsmen found brandishing a firearm in the old hospital building, the government's liability would have gone unquestioned. Congress did not intend that the applicability of the intentional tort exception would turn on the happenstance of the employment status of the individual the government negligently allowed to commit an intentional tort: an injury caused by an intentional tort of a federal employee no more "arises out of assault [and] battery" than does one caused by the intentional tort of a nonfederal employee. Accordingly, the intentional tort exception cannot apply when the employment status of the assailant is immaterial to both the government's duty and the actual commission of the intentional tort.

3. The suggestion in *Shearer*, and the holdings of certain lower courts, that claims of "negligent supervision" [4]

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[4] "Negligent supervision" has been used to describe a broad array of claims, ranging from negligence in hiring and retention to actual supervision on the job. We will use "negligent supervision" in the same manner as did *Shearer; i.e.*, to refer to claims of the breach of such duties to prevent intentional torts as might arise solely out of the fact of government employment.

We submit that an analysis that focuses on "negligent supervision" leads away from Congress' purposes in enacting the intentional tort exception. It may be, as the government argued in *Shearer*, that "an employer has no general duty to exercise reasonable care to prevent an employee from injuring others while acting outside the scope of his employment and off the employer's premises." Brief for the United States at 11, *United States* v. *Shearer*, 473 U.S. 52 (1985). But if this is so, then such claims are properly rejected because there is no duty, not because of § 2680(h). The key to applicaiton of the intentional tort exception to a negligence claim is attention to the elementary components of negligence: duty, breach, causation and injury. Focus upon particular classes of claims is unenlightening and potentially misleading.

can never lie against the government is inconsistent both with the broad remedial purposes of the FTCA and its specific directive that the "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Congress intended that a federal day care center be held to the same standard as a private one; that a government truck driver be held to same standard as a teamster. The purpose of the intentional tort exception was to protect the public fisc in cases where the government has no control over a federal employee's commission of an intentional tort, *i.e.*, where without notice or warning a federal employee engages in aberrant behavior that causes injury to a third party. It was not to absolve the government for the consequences of its negligence in allowing its agents to commit intentional torts when it did have both the opportunity and duty to prevent the injury.

Section 2680(h) speaks in terms of claims "arising" out of intentional torts, not claims resulting from or involving them. The proper focus must be on the genesis of the injury, not its most immediate cause. If the injury had its genesis in the government's negligence, then the government, just as a private individual, must be held to answer. Contrary to the suggestion in *Shearer*, this is not a matter of artful pleading, but instead one of proof. Whereas a private employer might be held to answer for the intentional torts of its employees solely by virtue of its status as employer, the United States plainly may not. But where an individual can show that the government was negligent in allowing one of its agents to commit an intentional tort, the government must be held to answer.

ARGUMENT

A. The Statutory Language, Legislative History and Congressional Purpose of the Intentional Tort Exception

The issue presented here is strictly one of statutory construction: to what extent did Congress intend that the government would be answerable for its negligence in failing to prevent federal employees from committing foreseeable intentional torts. Specifically, this case focuses on Congress' intent in preserving sovereign immunity for claims "arising out of assault [and] battery." This statutory directive has proved susceptible to differing interpretations, and courts have found that the legislative history of the applicable provisions provides little insight into this particular question of governmental negligence. However, the more natural reading of the statute is that the government is liable when intentional torts arise out of its negligence, and this reading is reinforced by the most direct legislative history available.

Moreover, the clear purpose of the Act was to hold the government responsible for its torts just as if it were a private person, and none of the rationales for the exceptions provides a compelling reason to thwart this broad remedial purpose. In light of this purpose, the available indicia of legislative intent show that Congress did not intend to create a blanket exclusion for all actions involving intentional torts committed by federal employees. Rather, Congress' intent was to waive sovereign immunity for governmental negligence, while maintaining that immunity for intentional tort claims based on *respondeat superior, simpliciter*.

1. Statutory construction begins with the plain language of the statute itself. Here, there are two relevant statutory provisions. Title 28, United States Code, § 1346 (b) provides that

> The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United

> States . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680, provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> > (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .

While the language of § 1346(b) is plain and unambiguous, the phrase "arising out of" is susceptible to at least two different constructions. The government argues, and *Shearer* concluded, that by employing this "sweeping" language, Congress meant to bar "not merely claims *for* assault and battery," but instead claims that "sound in negligence but stem from a battery committed by a Government employee." 473 U.S. at 55.

While this is a possible reading of the statute, it can just as easily (and, we submit, more naturally) be read to exclude claims *the genesis of which* is assault or battery. Had Congress intended the *Shearer* result, it presumably would have used language such as "claims *involving* assault or battery," or even "any damage from assault and battery." *Cf. United States* v. *James*, 106 S.Ct. 3116, 3121 (1986). *Shearer's* characterization of the "arising out of" language as "sweeping" is gratuitous: nothing in the statute indicates that Congress meant this language to be expansive, rather than restrictive. The much-trumpeted distinction between "arising out of" and "for" assault and battery (*see Collins* v. *United States*,

259 F. Supp. 363, 364 (E.D. Pa. 1966); *Shearer*, 473 U.S. at 55) is of itself no more illuminating than the distinction between "arising out of" and "involving." It is no more compelling to say that Congress meant "arising out of" to be construed broadly because it did not say "for" than it is to say that it should be construed narrowly because it did not say "involving."

Focus properly should be on the words Congress used, not those it did not use. A fundamental axiom of statutory construction is that a statute must be construed using the literal or usual meaning of the language employed unless to do so would work absurd results or thwart the obvious purpose of the act. *In Re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). Congress chose to use the word "arising," and as it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used,[5] *United States* v. *Locke*, 471 U.S. 84, 95 (1985), presumably Congress intended to hinge the government's amenability to suit on whether the claim originated in governmental negligence. "Arising out of" cannot connote the "immediate cause" of the injury. *Shearer*, 473 U.S. at 55. Hewing to the ordinary language employed by Congress, the intentional tort exception cannot properly be read to foreclose all suits in which an intentional tort foreseeably resulted from governmental negligence.

2. The congressional intent behind the passage of the FTCA is plainly revealed by the legislative history. Congress had begun the process of limiting sovereign immunity in 1855, when it consented to suit in contract actions, and continued on that course by waiving immunity in patent infringement claims in 1910 and admiralty and maritime claims in 1920 and 1925. *See Rules to Provide*

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[5] To "arise" is defined as to "spring up, originate, to come into being or notice." Black's Law Dictionary 99 (5th ed. 1979). *See also* Webster's Third New International Dictionary 117 (1961) (defining arise as "to originate from a specified source").

for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary, 77th Cong., 2d Sess. 38 (1942). From 1919 until the passage of the FTCA in 1946, virtually every Congress considered some form of federal tort reform. *See* H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1945). Indeed, in 1931 Congress passed, but had vetoed, a bill substantially identical to the one enacted in 1946. *See* S. 211, 72d Cong., 1st Sess.; 75 Cong. Rec. 191 (1931). No justification for continued sovereign immunity for tort claims could be identified, and the reliance on private relief bills had proved inadequate. *See* S. Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946); S. Rep. No. 1011, 79th Cong., 2d Sess. 25 (1946). As the Committee stated in its explanatory remarks on H.R. 5373 (*Rules to Provide for the Adjustment of Certain Tort Claims, supra*, at 37-57):

> The survival of Government irresponsibility in the field of common-law torts is an anachronism, founded upon no sounder reason than historical prejudice against tort claims. No acceptable justification has ever been cited for this immunity.

Id., at 42. Thus, Congress' purpose in enacting the FTCA was to waive this archaic immunity and establish a uniform means for allowing those injured by government negligence to seek redress. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955).

The legislative history of the FTCA as a whole is as abundant as the history of the intentional tort exception is sparse. While intentional tort exceptions began to appear in proposed legislation as early as 1931, *see* S. 211, *supra*, § 206(13), 75 Cong. Rec. at 191, no discussion of these exceptions appeared until 1940. *See* H.R. Rep. No. 2428, 76th Cong., 2d Sess. 1-2 (1940) (limiting the right to sue in "certain classes" of torts). The legislative history most frequently focused upon, however, is the colloquy between Assistant Attorney General Francis M. Shea and members of the House Judiciary Committee:

> Mr. Robsion: On that point of deliberate assault that is where some agent of the government gets in a fight with some fellow . . . [a]nd socks him?
>
> Mr. Shea: That is right.
>
> Mr. Cravens: Assuming a C[ivilian] C[onservation] C[orps] automobile runs into a man and damages him . . ., is not that considered an assault and is not the action based on assault and battery?
>
> Mr. Shea: I should think not. I would think under the common law rather that would be trespass on the case.
>
> * * * *
>
> Mr. Cravens: This refers to a deliberate assault?
>
> Mr. Shea: That is right.
>
> Mr. Cravens: If he hits someone deliberately?
>
> Mr. Shea: That is right.
>
> Mr. Cravens: Is it not intended to exclude negligent assaults?
>
> Mr. Shea: No. An injury caused by negligence could be considered under the bill.

Rules to Provide for the Adjustment of Certain Tort Claims, supra, at 33-34. As this dialogue demonstrates, Congress did not give extensive consideration to the intricacies of tort law in adopting the assault and battery exception. To the extent any intent relevant to the present inquiry can be gleaned from this legislative history, however, it is that Congress did not intend to absolve the United States of liability for "negligent assaults," or injuries "caused by [its] negligence."

In addition to the recorded legislative history, two other sources shed light on Congress' intent in passage of the intentional tort exception. First, as *Shearer* recognized, Congress did not intend the intentional tort exception to bar *all* claims involving assault and battery: claims of governmental negligence allowing an intentional tort to be committed by nonfederal agents were

not to be precluded. 473 U.S. at 56-57. *Shearer* reconciled itself with *Panella* and its progeny, by focusing on Congress' purported intent to absolve itself of all liability for the intentional torts of its employees. While we question the soundness of this analysis, we know at least that claims of governmental negligence in failing to prevent the commission of an intentional tort by a nonfederal agent indisputably do not "arise out of" assault or battery within the meaning of § 2680(h).

Second, Congress revisited the intentional tort exception in 1973 and 1974 when it amended § 2680(h) to allow for recovery for claims "arising . . . out of assault [or] battery" of federal law enforcement officers. *See* Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974). The impetus behind the amendment was a series of raids by federal agents in Collinsville, Illinois. Congress determined that individuals similarly harassed should not be relegated solely to *Bivens* actions to seek compensation. *See* S. Rep. No. 588, 93d Cong., 2d Sess. 4 *reprinted in* [1974] U.S. Code Cong. & Ad. News, 2789, 2790-91.

The 1974 amendment to § 2680(h) makes clear that Congress understood "arising out of" to refer only to *respondeat* claims for the enumerated torts. In language that tracks the original statute, Congress waived sovereign immunity for "any claim arising . . . out of assault [or] battery" committed by federal investigative and law enforcement officers. Congress stated that this provision "make[s] the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] (and for which that case imposes liability upon the individual Government officials involved)." S. Rep. No. 588, *supra*, at 4. *Bivens* involved only the intentional conduct of federal agents.

As this Court recognized in *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), § 2680(h) as amended "contemplates that

victims of . . . intentional wrongdoing shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officers alleged to have infringed their constitutional rights." This is the paradigm of a *respondeat* claim. Congress did not intend to do more than modify its 1946 exemption for *respondeat* claims. It certainly did not intend generally to expand or limit negligence claims of any sort.

Shearer cites the legislative history of this amendment for the proposition that "Congress did not hint that it thought the Government's liability for an assault and battery turned on the adequacy of supervision or warnings." 473 U.S. at 56. While this is true, it is too thin a reed to support *Shearer's* conclusion. Congress did not enumerate all possible claims under the FTCA because it intended state tort law to determine the available causes of action, and state tort law distinguished between *respondeat* and negligent supervision.

More important than what Congress did not do, of course, is what it did. And what it did was to waive sovereign immunity in the very language it used to create the intentional tort exception; *i.e.*, Congress made the government answerable for claims "arising . . . out of assault [or] battery" committed by law enforcement personnel. There is no dispute that Congress' expressed intent in enacting the amendment, as evinced by its plain language and ample legislative history, was to create *respondeat superior* liability for this class of intentional torts. Yet if Congress' 1974 use of the phrase "arising out of assault [or] battery" effected a waiver of sovereign immunity for *respondeat superior* claims, then its use of the identical language in 1946 must have been similarly limited to *respondeat* claims. Thus, contrary to *Shearer's* observation, the 1974 amendment fortifies the contention that the original Act spoke only to preserving immunity for *respondeat superior* claims of intentional torts. Congress did not hint (either

in the original enactment or in its amendment) that the government's liability should turn on the fortuity of the employment status of the assailant, or that liability should be determined without analysis of the nature of the government's duty to the victim. Yet this is precisely what courts applying *Shearer* have held.

3. Neither the statutory language nor the legislative history deals specifically with the issue of whether Congress intended to absolve the government of its responsibility for negligence in failing to prevent the commission of an intentional tort. None of the reasons underlying the adoption of the exceptions of § 2680, however, would justify the *Shearer* result. Moreover, it was firmly established when Congress began to consider draft proposals of a Tort Claims Act that state tort law differentiated between *respondeat superior* claims and claims of negligent supervision. Thus, placed in its historical perspective, and considered along with the announced policies underlying the exceptions, the intentional tort exception cannot be construed broadly to exclude all claims involving intentional torts committed by federal employees.

a. There are three policies generally seen as underlying the exceptions of § 2680:

> ensuring that "certain governmental activities" not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending coverage of the Act to suits for which adequate remedies were already available.

Kosak v. *United States*, 465 U.S. 848, 858 (1984). Of these three policies, only the second has any bearing on the intentional tort exception. The first rationale speaks to governmental activities that should be conducted free of the threat of damages suits, *i.e.*, those activities that involve the exercise of governmental discretion. *See* 28 U.S.C. § 2680(a), (b) and (c). The third rationale, the

existence of alternative avenues of relief, 28 U.S.C. § 2680(d), could not apply to the intentional tort exception, as indeed the lack of any remedy at law, and the consequent deluge of private relief bills, was one of the primary motivations behind the Act. *See Indian Towing Co.*, 360 U.S. at 69. Thus, only the second of these policies arguably applies to the intentional tort exception.

While it is unclear as a general matter how intentional tort claims are more susceptible to exaggeration and fraud than any other claim, however that may be, claims of negligently allowing an intentional tort to be committed are no different from any other claim of negligence. In any claim of negligence, the plaintiff would need to establish the existence of a duty.[6] There is no possibility of exaggeration or fraud in establishing this duty—indeed it is purely a question of law. Thus the sole policy underlying the intentional tort exception does not support differentiation between negligence claims in general and claims of negligent failure to prevent the commission of an intentional tort.

b. Moreover, at the time of Congress' consideration of the FTCA, the common law recognized two distinct claims against employers for the intentional injuries inflicted by their employees. *See* Harper and Kime, *Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 896 (1934) (employer's ability to control employee's conduct imposes duty to control, even in situations where the employer could not be held liable under *respondeat superior* doc-

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[6] Thus, for example, in an automobile negligence case, the plaintiff would have to prove that the government owed him a duty, that it failed to exercise that duty with due care, and that this failure proximately caused his injury. In a case of negligent failure to prevent the commission of an intentional tort, the only proof that would differ significantly would be in the establishment of a duty; *i.e.*, instead of proving that the government had, for example, a duty not to drive at an excessive speed, the plaintiff would have to prove that the government had a duty not to allow firearms to come into the hands of inebriated individuals.

trine); Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105, 105-06 (1916) (distinguishing liability based on employer's direct involvement from that based on *respondeat superior*). *See also* F. Harper, *A Treatise on the Law of Torts*, §§ 75, 291 at 174, 638-40 (1933) (describing two separate causes of action). Harper clearly explained that a negligence claim was not precluded when the supervised individual committed an intentional tort:

> [W]here the anticipation of negligent, intentionally wrongful or innocently dangerous conduct on the part of some third person is the very hazard which makes a defendant's conduct negligent, such activity by the third person will not operate as a superseding cause to relieve the defendant from liability therefor. Any other rule would, quite obviously completely frustrate the principle of negligence requiring one to abstain from conduct which creates an unreasonable hazard to others by creating an opportunity or temptation for the dangerous conduct of third persons.

Harper, *A Treatise on the Law of Torts*, § 75 at 174. In stronger language, Harper subsequently stated:

> [I]t is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.

Harper, *supra*, 43 Yale L.J. at 898. Negligent supervision thus was based on the employer's own conduct, and a claim would lie equally whether the supervised individual inflicted the injury negligently or willfully. *E.g.*, Harper, *A Treatise on the Law of Torts*, § 75 at 174. *Accord*, Fleming, *Vicarious Liability*, 28 Tul. L. Rev. 161, 188 (1954).

At the same time, the traditional doctrine of *respondeat superior* had been expanded to hold employers liable without fault for their employees' intentional torts committed

within the scope of their employment. *E.g.*, Note, *The Growth of Vicarious Liability for Wilful Torts Beyond the Scope of the Employment*, 45 Harv. L. Rev. 342 (1932). This doctrine was recognized as simply a means by which liability for a valid tort claim against a frequently judgment-proof employee could be shifted to the employer, giving the victim two tort claims for the same conduct: a tort claim directly against the tortfeasor/employee, and a *respondeat* claim against the employer. *See* Fleming, *supra*, 28 Tul. L. Rev. at 168.

Contemporary commentators expressed concern that the expanding definition of "scope of employment" was not anchored in concepts of the employer's control over his employees, but that it actually reflected a social policy decision to place the loss "on the one who can best afford to bear it." Note, *The Growth of Vicarious Liability*, *supra*, 45 Harv. L. Rev. at 349 n.53. *See also* Laski, *supra*, 26 Yale L.J. at 116-21. There was real concern that the lack of factual or doctrinal basis for expansion of the "scope of employment" presented "limitless possibilities" for the reach of *respondeat* liability. Note, *The Growth of Vicarious Liability*, *supra*, 45 Harv. L. Rev. at 348. Congress no doubt shared this concern that expansive "employment scope" definitions would make the public fisc vulnerable to innumerable claims nationwide, based on conduct over which the government could have had no reasonable control.

Whatever weaknesses were perceived in the existing *respondeat* trends, the important issue for our analysis is that at the time the FTCA was passed, both negligent supervision and *respondeat superior* were established common-law tort claims, and each provided a separate basis of liability. No concerns were expressed by either Congress or commentators that straight negligence claims, based on an identified duty to supervise or otherwise control an employee's conduct, would result in excessive government liability.

Legislating within this framework, Congress reserved sovereign immunity for certain classes of torts, among them "claims arising out of assault [or] battery." 28 U.S.C. § 2680(h). Claims based on supervision, hiring or control of employees are not mentioned in § 2680(h). Rather, § 2680(h) lists a number of intentional torts that were commonly used to support a *respondeat superior* claim. There is no indication in the language of the statute, or in the legislative history, that Congress considered this provision to reach all negligence claims involving intentional torts. Indeed, given this historical perspective, it appears that Congress wanted solely to forestall the encroachment of *respondeat superior* liability, at least until "considerable experience ha[d] been had under the proposed legislation." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 13 (1940).

B. The Intentional Tort Exception Is Inapplicable Where the Government Has Breached a Duty Either Voluntarily Assumed or Imposed Upon It by Statute or Regulation

While there have been several cases which, in the wake of *Shearer*, have held that the government is not amenable to suit for claims of "negligent supervision," the court below is the only one to hold that the government is not responsible for the damages caused by its breach of a voluntarily assumed duty. In *Kearney* v. *United States*, 815 F.2d 535, 538 (9th Cir. 1987), the court held the government answerable for its negligence, including the violation of its regulations, in allowing an imprisoned military enlistee to escape and commit murder. Similarly, in *Lorrits* v. *United States*, 489 F. Supp. 1030 (D. Mass. 1980) and *DeLong* v. *United States*, 600 F. Supp. 331 (D. Alaska 1984), the government was held responsible for the intentional torts of its employees because in both cases it had voluntarily assumed a duty to protect the victims. In *Doe* v. *Scott*, 652 F. Supp. 549

(S.D.N.Y. 1987), *appeal pending*, No. 87-6061 (2d Cir. argued Oct. 2, 1987), the court held the government liable for allowing infants it supervised in a day care center to be molested. Most recently, in *Doe* v. *United States*, Nos. 87-1436 and 87-1437 (7th Cir. Jan. 21, 1988), the Seventh Circuit held the government liable for its failure adequately to safeguard children at a day care center and thus to allow an unidentified person to molest them.

Like these suits, the Sheridans claim that when the government promulgated regulations concerning weapon storage and safety, it voluntarily assumed a duty to protect them from injury.[7] As we argued below, *Shearer* did not purport to address situations in which the government's duty to the victim arose independent of its status as the assailant's employer. Thus, while we take issue with *Shearer's* analysis as a whole, it is particularly inapt in this context.

1. At the time of the FTCA's consideration and passage, it had been firmly established throughout the country that one who voluntarily undertook a duty was obligated to perform that duty with reasonable diligence. *See* Restatement of Torts § 323. By subjecting the United States to liability for its "negligent or wrongful act[s] or omission[s]," 28 U.S.C. § 1346(b), Congress intended to encompass the entire range of conduct classified as tortious under state law. *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972). Indeed, it is now axiomatic that

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[7] As Chief Judge Winter recognized in his dissent, "the passage of regulations concerning weapon storage and safety constitutes . . . a voluntary assumption of duty." *See* Pet. App. A at 14a. *See also Underwood* v. *United States*, 356 F.2d 92, 98-99 (5th Cir. 1966) ("the [weapons regulations] were intended to minimize accidents and prevent injury to persons: they were for the benefit of the public, including [the victim.]") Certainly a foreseeable consequence of the breach of the Navy Medical Center's weapons regulations was that someone on or near the base would be injured.

where the government has voluntarily assumed a duty, it is responsible for carrying out that duty with due care. *Block* v. *Neal*, 460 U.S. 289, 297 (1983); *Indian Towing Co.*, 350 U.S. at 69.

No distinction in common law exists between voluntary assumption of a duty to prevent the commission of intentional torts and the voluntary assumption of any other duty. Nor is there any language in the FTCA which would suggest that Congress sought to make such a distinction. Moreover, as we noted above, the legislative history is devoid of any suggestion that this was Congress' intent.

To be sure, the language "arising out of assault [or] battery" can be read broadly to encompass all claims involving intentional torts. But as *Shearer* recognized (by accepting the *Panella* line of authority), Congress did not intend to cut such a wide swath with this exception. It is unlikely that Congress would make such a radical departure from established tort law without providing even a hint, in the Act or its history, that this is what it sought to do. The paramount purpose of the Act was to waive an unjustifiable and archaic immunity, and the only countervailing consideration of § 2680(h) was to protect the government from excessive and fraudulent claims. A claim of failure to observe a voluntarily assumed duty to prevent an intentional tort is no more capable of exaggeration or inflation than any other claim involving the breach of a duty voluntarily assumed. Thus neither purpose reveals or supports an intent to exculpate the government for its failure to observe a voluntarily assumed duty. Reading the intentional tort exception to bar voluntarily assumed duty claims therefore lacks textual support and flouts the plain purposes for the enactment of the applicable provisions.

2. The analysis in *Shearer* is premised on the notion that Congress did not distinguish between claims of negligent supervision and *respondeat superior* claims. 473

U.S. at 55. But a claim of failure to perform a voluntarily assumed duty is wholly distinct from both negligent supervision and *respondeat* claims. These distinctions, particularly in the nature of the imposition and execution of the duty, demonstrate that Congress did not intend to place this particular class of claims within the bar of § 2680(h).

Specifically, those opinions that have held the government responsible for its affirmative obligations, independent of its status as the assailant's employer, have distinguished *Shearer* on the basis that in a "negligent supervision" claim,[8] the relationship between the government and the victim arises "only at the time of the assault and only because of the assault." *Doe* v. *United States*, slip op. at 7. *See also Doe* v. *Scott*, 652 F. Supp. at 551; *Thigpen* v. *United States*, 800 F.2d 393, 398 (4th Cir. 1986) (Murnaghan, J., concurring). In contrast, in all independent affirmative duty cases, there must be a special duty undertaken by the government (or imposed upon it by statute or regulation) upon which the public is entitled to rely.[9]

This position is the same as that taken by the government at lease twice before in this Court. Brief for the United States at 22 n.5, 24, *United States* v. *Shearer*, 473 U.S. 52 (1985); Brief for the United States at 4

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[8] As we stated above, the distinction between negligent supervision claims and other claims is generally unhelpful. See note 4, *supra*. We refer to this class of claims here, however, in contradistinction to claims in which the government's duty arises apart from the fact that it is the assailant's employer.

[9] The independent duty in this case arises out of the Navy's regulations concerning storage of firearms. In *Bennett* v. *United States*, 803 F.2d at 1502, 1503 (9th Cir. 1986) (although the court's analysis did not turn on this point), the government's duty to operate a school arose out of statute. Why the government has taken upon itself the responsibility to protect members of the public is not as important, of course, as the fact that once it has done so, it is obligated to execute that responsibility with due care.

n.7, *Johnson* v. *United States*, *cert. denied*, 107 S.Ct. 315 (1986). In particular, the government noted that an actionable duty to supervise, not barred by § 2680(h), would arise if "the intentional tortfeasor was, for example, a dangerous mental patient who also happened to be a government employee." Brief for the United States at 22 n.5, *Shearer*. The government emphasized that this duty must arise from the government's knowledge that "special hazards" are posed to third parties. *Id.* at 24. The government's arguments in this respect are consonant with ours, and correctly state the law.

When the government has undertaken such an affirmative obligation, as, for example, in operating a day care center, its duty to protect its wards from harm flows directly from that undertaking. As in *Doe* v. *United States*, the government breaches its duty not when the child is assaulted, but instead when it fails to exercise adequate supervision over the child, thus enabling the assault to occur. A negligence claim is only complete upon injury, of course, but in this situation, once the government breaches its duty to care for the child, injury could come in any number of ways. The child could be hit by a car, assaulted, injured as a consequence of nearby blasting, or even struck by lightning. Yet no matter how the child is injured, the government's duty is the same and its breach of that duty is the same. The claim of a child thus injured by assault no more arises out of an intentional tort than does the claim of a child injured in blasting arise out of inherently dangerous activity.[10]

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[10] Surely the government would concede that a child at a federally-operated day care center negligently allowed to wander into an area of, and subsequently injured by, government blasting, would have a viable claim under the FTCA. This is so not because there is no specific exclusion for inherently dangerous activities, but instead because there are two separate torts, related only in that the second catalyzed the incipient negligence into injury.

The government's duty to the Sheridans arose when it promulgated regulations concerning firearms. It breached that duty 1) when Mr. Carr brought the weapons onto the base; 2) when his roommate failed to report this to base security; and 3) when the three corpsmen found him with the rifle but failed to alert base security. The Sheridans could as easily have been injured by an accidental discharge of Mr. Carr's weapon as they were by his intentional firing. But in either case, the government's duty was the same and its breach of that duty the same.

The court below dismissed this argument without extended discussion. But inherent in the court's decision must have been that Congress intended, in using the "arising out of" language, to hinge liability on acts wholly unrelated to the government's duty and breach thereof. It is, of course, not lightly to be inferred that Congress intended such untenable distinctions, *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982), and thus, given the ambiguity of the statutory language and the absence of supporting legislative history, this construction of § 2680(h) must be rejected.

C. The Intentional Tort Exception Is Inapplicable Where the Assailant's Status as a Federal Employee Is Not Related to the Injury

We argued below that the intentional tort exception cannot bar claims involving intentional torts where the status of the assailant as a federal employee was only coincidental to the government's duty and breach and the ultimate injury. More specifically, we argued that the government's negligence in this case, allowing the storage of the weapons on base and failing to take adequate safeguards once an individual was found wandering the campus of Bethesda Naval brandishing a firearm, could as easily have been actuated into injury by a federal employee as by a private citizen. The Fourth Circuit's re-

jection of this argument imparts an utterly absurd intent to Congress and focuses liability on the particulars of the assailant's employment status rather than the government's duty and breach thereof. Such a distinction is wholly unknown to the common law that Congress intended to incorporate under the FTCA. Thus, the rigid employee/nonemployee dichotomy is untenable.

1. The Sheridans were fired upon by a federal employee. This fact, critical to the courts below, has absolutely no bearing on either the existence of the government's independent duty to the Sheridans or the government's breach of that duty. Congress could not have intended that the government's liability would turn on the fortuity that the assailant who actuated its negligence into injury happened to be on the federal payroll.

As Chief Judge Winter recognized in his dissent, the government's liability in this case would have been unquestioned "had it been a private citizen who took the weapons wrongfully stored in Mr. Carr's room, or had it been a private citizen who the three corpsmen found wandering drunk and brandishing a rifle." Pet. App. A at 12a. And, indeed, that it was a federal employee was purely fortuitous—it could as easily have been a patient, private citizen, or even a newly-discharged corpsman who removed the weapon and who was found brandishing it in the old hospital building. Had this one fact been different, then the government would have been liable. Yet its duty would have been the same, its breach of that duty the same, and the injury to the Sheridans the same.

Similarly, and perhaps more starkly, *Doe* v. *United States* demonstrates the illogic of focusing on the employment status of the assailant to determine the applicability of § 2680(h). In *Doe*, the identity of the assailant was unknown—it could have been a federal employee (either on duty or off), or a private citizen. Focusing on the employee/nonemployee distinction, the district court dismissed the complaint, holding that the plaintiffs'

claims were jurisdictionally barred unless they could establish that the assailant was not a federal employee. Here, again, the government's duty, its breach, and the injury were all unaffected by the assailant's employment status. The Seventh Circuit, properly, reversed.

Focusing solely on the employment status of the assailant thus leads to absurd results. As Justice Frankfurter held in an analogous context:

> we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance . . .

Indian Towing Co., 350 U.S. at 67. Congress did not intend the "arising out of" language to preclude all suits in which the government's negligence was to allow an intentional tort to be committed. *See Panella*, 216 F.2d at 624; *Shearer*, 473 U.S. at 56-57. Yet the Sheridans' claims, where the assailant happened to be a federal employee, and the Does' claims, where the identity of the assailant was unknown, no more "ar[ose] out of assault [or] battery" than did Panella's. Since statutes must be construed to avoid creating "untenable distinctions and unreasonable results," *American Tobacco Co.* v. *Patterson*, 456 U.S. at 71, and since we know that the intentional tort exception does not bar *all* suits involving assaults and batteries, it cannot be presumed that Congress intended to limit the intentional or exception to circumstances so utterly divorced from the policies underlying the adoption of the Act, and, indeed from common sense.

2. The court below acknowledged that its rigid employee/nonemployee rule necessarily required analysis of whether the assailant was on or off duty at the time he committed the assault. Pet. App. A at 4a n.1. *See also id.*, at 18a & n.10. To be sure, since an off-duty federal employee is indistinguishable from a nonemployee for purposes of the FTCA, and since Congress indisputably was concerned only with the conduct of its employees

acting within the scope of their employment, the within-the-scope employee/other person distinction is slightly more tenable than a strict employee/nonemployee rule.

Shearer, however, did not draw this distinction. Indeed, there was no contention that Private Shearer's assailant was on duty or acting within the scope of his employment when he committed the battery. *Shearer*, by focusing solely on where the assailant got his paychecks, drew a "bright line," but it drew it on the basis of a fact wholly unrelated to Congress' purposes in creating the Act and the intentional tort exception.

Moreover, the "bright line" supposedly drawn by *Shearer* is in reality quite fuzzy. According to *Shearer*, Congress intended to absolve the government of its negligence in allowing "its employees" to commit intentional torts. But there are myriad types of federal employees. *Shearer* is not instructive, for example, on how Congress intended to treat intentional torts committed by part-time employees, temporary employees, or seasonal employees. Nor is *Shearer* instructive on how to treat the intentional torts of employees on unpaid leave, reemployed annuitants (who draw their salary from the Civil Service Retirement Fund rather than agency appropriations), or retired military officers whose annuities are "reduced compensation for reduced current services." *McCarty* v. *McCarty*, 453 U.S. 210, 222 (1981). The permutations are endless and not resolvable on any principled basis by *Shearer's* putative "bright line."

Undoubtedly, the government can come up with some rationale for treating each of these classes of employees. But it is one thing for the government to conjure a paradigm for treating these varying employment situations; it is quite another to assume that this is what Congress intended:

> There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.

Indian Towing Co., 350 U.S. at 68. It defies common sense to say that Congress, in considering the breadth and scope of § 2680(h), intended its application to hinge on such arcana.

Congress' focus exclusively was on the consequence of the acts of the government's employees acting within the scope of their employment. If there is any merit to determining the applicability of the intentional tort exception by reference to the assailant's employment status, and we submit there is at best little, then this distinction must turn on whether the assailant was acting within the scope of his employment. The contrary proposition attributes irrational and bizarre motives to Congress, flouts Congress' overriding consideration in enacting the FTCA and affronts common sense. It cannot be accepted.

D. The FTCA Does Not Exclude "Negligent Supervision" Claims as a Class

The decision in *Shearer* excludes "negligent supervision" claims as a class from the FTCA. It must be conceded that this exclusion is not required by the language of the statute. Moreover, as we have shown above, there is nothing in the legislative history that supports, let alone compels, it. What does emerge from the language and history of the FTCA is a congressional intent to incorporate into the body of federal tort law the common law principles of tort that have been developed in the various states.

Thus, the common law of tort—not the FTCA—determines the existence of the government's duty, the reasonableness of the government's conduct in discharging that duty, whether any breach proximately caused the claimant's injury, and hence, the viability of the negligence claim. This must be the basis for the "negligent supervision" claim addressed in *Shearer* and presented here.

Shearer tacitly acknowledged this analysis by endorsing *Panella*, yet concluded that when the "injury" component of the negligence claim identifies physical injuries inflicted by a government employee, the negligence claim "arises out of assault [or] battery" and is barred by § 2680(h). It is clear from the legislative history, however, that Congress understood that the FTCA would bar claims when intentional and not negligent conduct led to an assault. *Rules to Provide for the Adjustment of Certain Tort Claims*, *supra*, at 34. In providing an exemption from the waiver of sovereign immunity for claims arising out of "assault [and] battery," Congress did not exempt, as it could have, all claims that related in any way to deliberate attacks by government employees. Congress did not exempt assault and battery as a general activity. Indeed, the only generic activities that Congress exempted in such wholesale fashion were clearly governmental ones, and it did so for all claims, whether based on intentional or negligent conduct. *See* H.R. Rep. No. 1287, *supra*, at 6; S. Rep. No. 1400, *supra*, at 33. Section 2680(h), in distinction, was understood to reach individual plaintiffs' "tort claims," not any particular activity. *Id.*

The lower court's exemption for "negligent supervision" claims is not compelled by *Kosak*, 465 U.S. 848; *United States* v. *Neustadt*, 366 U.S. 696 (1961); or *Block*, 460 U.S. 289. *Block* held that the mere existence of a partial overlap between an exempt and a non-exempt claim does not bar the non-exempt claim. 460 U.S. at 298. This holding certainly does not stand for the general proposition adopted in *Shearer*.

Similarly, *Kosak* is not dispositive because it dealt with a provision of the FTCA that was designed to exempt an entire category of governmental activity—namely, detention of goods by customs officials. The construction of the exempting language there was premised on a clearly discernible congressional intent to exempt a

whole category of governmental activity. There is nothing comparable here.

Finally, *Neustadt*, 366 U.S. at 703-06, which held that the misrepresentation exemption of the FTCA includes both intentional and negligent misrepresentations, must be read in conjunction with *Block*. Again, *Block* holds that an overlap between an exempt and non-exempt claim does not defeat the viability of the non-exempt claim. 460 U.S. at 298. *Neustadt* had only a single claim. The situation here, if anything, is analogous to *Block* and, as indicated above, that holding thus does not compel the broad, across-the-board ruling made in *Shearer*.

At all events, the governmental conduct the Sheridans rely upon for their claim is garden-variety negligence. The viability of this negligence claim is determined by negligence law, not by whether Mr. Carr's conduct meets the elements of a tortious assault or battery under Maryland state law. If a complaint alleges no cognizable duty that arose or was breached, tort law will dispose of the claim. *Shearer*'s concern that this claim would be no more than a "semantical recasting of events" is unclear: as distinct from § 2680(c), for example, Congress' intent in creating the intentional tort exception was not to protect government activity from the threat of damage suits. A plaintiff can "recast" his complaint all he chooses, but if he cannot articulate a duty his complaint will be summarily dismissed.

Shearer ignores the imperatives of tort law, and the broader result *Shearer* produces is not supported by prior judicial interpretation of § 2680(h) or the intent of the Act. The sovereign immunity reserved for specific intentional torts, as the Ninth Circuit has held, "[does] not insulate the government from liability where its own negligence [is] the proximate cause of the injury." *Morrill* v. *United States*, 821 F.2d 1426, 1427 (9th Cir.

1987). The court of appeals below has held to the contrary, and its ruling must be reversed.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

IRVING KATOR
JOSEPH B. SCOTT
DAVID H. SHAPIRO
MICHAEL J. KATOR *
KATHERINE L. GARRETT
KATOR, SCOTT & HELLER, Chtd.
1029 Vermont Avenue, N.W.
Ninth Floor
Washington, D.C. 20005
(202) 393-3800
Counsel for Petitioners
* Counsel of Record

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